No. 15419

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

A. G. RUSHLIGHT & CO., a corporation,
Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Oregon

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-5-57

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Appellant,

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A. G. RUSHLIGHT & CO., a corporation,
Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Oregon

NAMES AND ADDRESSES OF ATTORNEYS

CHARLES K. RICE,
Assistant Attorney General,

LEE A. JACKSON,
Attorney,
Department of Justice,
Washington, D. C.,

C. E. LUCKEY,
United States Attorney,

EDWARD J. GEORGEFF,
Assistant United States Attorney,
United States Courthouse,
Portland, Oregon,

For Appellant.

HUTCHINSON, SCHWAB & BURDICK,
DENTON G. BURDICK, Jr.,

420 Equitable Building,
Portland 4, Oregon,

For Appellee.

III.

James W. Maloney was, from July 17, 1933, to September 1, 1947, the Collector of Internal Revenue for the District of Oregon, and Hugh H. Earle was, from September 1, 1947, to November 1, 1952, the Collector of Internal Revenue for the District of Oregon. At all times subsequent to October 30, 1952, R. C. Granquist has been the District Director of Internal Revenue for the District of Oregon.

IV.

On or about March 15, 1944, plaintiff filed with the Collector of Internal Revenue for the District of Oregon its corporation excess profits tax return for the calendar year ending December 31, 1943, and on or about June 1944 the Commissioner of Internal Revenue made an assessment against the plaintiff for excess profits taxes for said year in the amount of $96,802.87, which amount was paid to James W. Maloney and Hugh H. Earle, as Collectors of Internal Revenue, and R. C. Granquist as District Director of Internal Revenue, on the dates and in the amounts as follows:

Collector or Director to whom Paid	Date of Payment	Amount of Payment
James W. Maloney	March 15, 1944	$ 3,988.60
James W. Maloney	July 5, 1944	4,412.83
James W. Maloney	October 30, 1944	16,046.93
James W. Maloney	November 25, 1944	10,000.00
James W. Maloney	March 13, 1945	25,084.08
Hugh H. Earle	March 31, 1952	32,401.25
Hugh H. Earle	April 16, 1952	4,275.99
R. C. Granquist	November 19, 1952	593.19
	Total	$ 96,802.87

V.

That prior to the expiration of the time prescribed in Section 275 of the Internal Revenue Code for the assessment of excess profits taxes, the Commissioner of Internal Revenue and the plaintiff, pursuant to Section 276(b) of the Internal Revenue Code, agreed in writing that excess profits taxes of plaintiff for the year ending December 31, 1943, might be assessed at any time prior to June 30, 1949, and pursuant to Section 322(b)(3) of the Internal Revenue Code the time within which plaintiff could claim the refund of any overpayment in its excess profits tax for said year 1943 was extended to and including December 31, 1949.

VI.

On or about August 23, 1948, plaintiff filed with the Tax Court of the United States in the case of A. G. Rushlight & Co. vs. Commissioner of Internal Revenue, Docket No. 20053, its verified petition, copies of which were served upon the Commissioner of Internal Revenue on or about August 23, 1948.

VII.

That said petition before the Tax Court set forth in detail all of the facts, grounds, and reasons which plaintiff claimed resulted in an overassessment in its excess profits taxes for the year ending December 31, 1943, in an amount not less than $54,218.68.

VIII.

That during the period from August 23, 1948, to

and including August 6, 1953, plaintiff, through its representatives, officers, attorneys and accountants, conferred with representatives of the Commissioner of Internal Revenue in regard to all of the matters set forth in its said petition, which matters petitioner contended required a determination by said Commissioner of Internal Revenue that there had been an overassessment and overpayment of plaintiff's excess profits taxes for said year 1943.

IX.

That on August 6, 1953, the Tax Court of the United States ordered that said proceeding before the Tax Court of the United States in so far as it related to petitioner's excess profits taxes for the tax year ended December 31, 1943, be dismissed for lack of jurisdiction. Plaintiff alleges that said Tax Court did not have jurisdiction over plaintiff's claim that there had been an overassessment in its excess profits taxes for said year 1943.

X.

On or about August 28, 1953, the Commissioner of Internal Revenue determined that there was an overassessment of plaintiff's excess profits taxes for the year ended December 31, 1943, in the sum of $65,905.29. That said determination was based upon the facts, grounds and for the reasons set forth by plaintiff in its petition before the Tax Court as heretofore alleged.

XI.

That said R. C. Granquist, as District Director

of Internal Revenue, refunded to plaintiff the amounts of $32,401.25, $4,275.99 and $593.19, being the payments made by plaintiff on account of excess profits taxes for said year 1943 on the respective dates of March 31, 1952, April 16, 1952 and November 19, 1952.

XII.

That said Commissioner of Internal Revenue and District Director of Internal Revenue have failed, refused and neglected to refund to plaintiff the balance of said overassessment, namely, the sum of $28,634.86.

XIII.

On January 6, 1954, plaintiff filed with the District Director of Internal Revenue for the District of Oregon for transmission to the Commissioner of Internal Revenue an amended claim for the refund of the sum of $66,832.82 excess profits taxes for the taxable year ending December 31, 1943, upon the ground that the petition of plaintiff before the Tax Court of the United States which was filed with the Commissioner of Internal Revenue constituted a claim for the refund of said 1943 excess profits taxes and that said petition was acted on as such by said Commissioner of Internal Revenue; and upon the further ground that all of the facts and contentions of the plaintiff which resulted in a determination by said Commissioner that there was an overassessment in said excess profits taxes were set forth in full in said petition. That on June 1, 1954, the plaintiff was given the statutory notice of the disallowance of said amended

refund claim as is provided in Section 3772(a)(2) of the Internal Revenue Code.

Count II.

For a second and further separate claim, and in the alternative, plaintiff alleges:

I.

Plaintiff realleges the allegations contained in paragraphs I, II, III and IV of its first separate claim.

II.

That on August 23, 1948, and within the period of time allowed by law for filing claims for the refund of excess profits taxes for plaintiff's taxable year ending December 31, 1943, plaintiff caused a petition to be served on the Commissioner of Internal Revenue which petition set forth in detail the facts, grounds and reasons why the plaintiff was entitled to the refund of not less than $54,218.68 in excess profits taxes for the plaintiff's taxable year ending December 31, 1943, and demanded that there be refunded to plaintiff excess profits taxes which had been illegally assessed against plaintiff for the reasons set forth therein.

III.

That the Commissioner of Internal Revenue had under consideration the matters referred to in said petition until approximately August 28, 1953, at which time said Commissioner and plaintiff reached an account stated, and it was agreed that there

had been an overassessment and overpayment by plaintiff of excess profits taxes for the year ending December 31, 1943, in the sum of $65,905.29.

IV.

That no part of said overassessment and overpayment has been refunded to plaintiff except the sum of $37,270.43, and defendant has failed, refused and neglected to refund the balance of said admitted overassessment to plaintiff, and there is now due and owing to plaintiff by defendant the sum of $28,634.86, together with interest thereon at the rate of six per cent per annum from the respective dates of the payment thereof.

Wherefore, plaintiff prays for judgment against defendant in the sum of $28,634.86, together with interest thereon from the respective dates of the payment thereof, and for its costs and disbursements incurred herein.

/s/ DENTON G. BURDICK, JR.
CAKE, JAUREGUY & HARDY,
Attorneys for Plaintiff

[Endorsed]: Filed July 14, 1954.

[Title of District Court and Cause.]

ANSWER

Count I.

The defendant by its attorney, Clarence Edwin Luckey, United States Attorney in and for the

1954 plaintiff filed with the District Director of Internal Revenue for the District of Oregon for transmission to the Commissioner of Internal Revenue claim for refund of the sum of $66,832.82 excess profits taxes for the taxable year ended December 31, 1943; that on June 1, 1954 plaintiff was given the statutory notice of the disallowance of said purported amended refund claim, as provided by Section 3772(a)(2) of the Internal Revenue Code; and for further affirmative answer defendant avers that no prior claim for the taxable year ended December 31, 1943 was ever filed by the plaintiff for the recovery of the taxes in question or any other tax for said year.

Count II.

For its answer to the second and further separate claim, and in the alternative as set out in Count II the defendant states:

1. The defendant realleges its answers to allegations contained in Paragraphs I, II, III and IV of plaintiff's first separate claim.

2. Denies the allegations of Paragraph II, save and except it is admitted that on August 23, 1948 the plaintiff filed a petition with the Tax Court of the United States, as is alleged and averred in Paragraph VI of Count I of its complaint; and a copy thereof was served on the Commissioner of Internal Revenue.

3. Denies the allegations of Paragraph III, save and except it is admitted and averred that the Commissioner of Internal Revenue had under con-

sideration the petition of the plaintiff before the Tax Court until August 6, 1953, when the Tax Court ordered that said proceeding in so far as related to petitioner's excess profits taxes for the tax year ended December 31, 1943, be dismissed for lack of jurisdiction.

4. Denies the allegations of Paragraph IV, save and except it is admitted that there had been refunded to plaintiff the sum of $37,270.43.

Wherefore, having fully answered both Counts I and II of the plaintiff's petition, the defendant prays for judgment in its favor for dismissal of plaintiff's cause of action as to each count for costs and all other proper relief.

C. E. LUCKEY,
Attorney for the Defendant, United States Attorney,
/s/ EDWARD J. GEORGEFF,
Assistant United States Attorney

Affidavit of Service attached.

[Endorsed]: Filed September 10, 1954.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This cause came on regularly for pre-trial conference before the undersigned Judge of the above-entitled court, on the 8th day of February, 1956. Plaintiff appeared by Denton G. Burdick, Jr., one of its attorneys, and the defendant appeared

by C. E. Luckey, United States Attorney for the District of Oregon, and Edward J. Georgeff, Assistant United States Attorney for the District of Oregon.

Nature of the Case

The question presented in this case is whether the plaintiff is entitled to recover the balance of $30,860.94, representing a part of an overpayment of plaintiff's excess profits tax liability for the taxable year ended December 31, 1943, in the amount of $65,905.29. Of said overpayment, the sum of $35,044.35 has been refunded to the plaintiff by the Commissioner.

The parties, with the approval of the court, agreed on the following:

Agreed Facts

I.

During all the times herein mentioned, the plaintiff was and is a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its office and principal place of business in the City of Portland, County of Multnomah and State of Oregon. At all times herein mentioned, the defendant United States of America was and now is a corporation sovereign and a body politic, and the court has jurisdiction of this action under and by virtue of Title 28, Section 1346(a)(1), United States Code.

II.

James W. Maloney was, from July 17, 1933 to September 1, 1947, the Collector of Internal Revenue for the District of Oregon, and Hugh H.

Earle was, from September 1, 1947 to October 30, 1952, the Collector of Internal Revenue for the District of Oregon. At all times subsequent to October 30, 1952, R. C. Granquist has been, and now is, the District Director of Internal Revenue for the District of Oregon.

III.

Plaintiff timely filed with the then Collector of Internal Revenue for the District of Oregon its corporation excess profits tax return for the taxable year 1943, disclosing thereon an excess profits tax liability of $96,802.87, which amount was duly assessed by the Commissioner against the plaintiff and was paid by the latter on the dates and in the amounts as follows:

Collector or Director to whom Paid	Date of Payment	Amount of Payment
James W. Maloney	March 15, 1944	$ 3,988.60
James W. Maloney	July 5, 1944	4,412.83
James W. Maloney	October 26, 1944	16,046.93
James W. Maloney	November 25, 1944	10,000.00
James W. Maloney	March 13, 1945	25,084.08
Hugh H. Earle	April 9, 1952 by way of credit	32,401.25
Hugh H. Earle	April 23, 1952 by way of credit	4,275.99
R. C. Granquist	November 19, 1952 by way of credit	593.19

IV.

Prior to the expiration of the time prescribed in Section 275 of the Internal Revenue Code of 1939 for the assessment of excess profits taxes, the Commissioner of Internal Revenue and the plaintiff, pursuant to Section 276 (b) of said Code,

agreed in writing that excess profits taxes due from plaintiff for the year ended December 31, 1943, might be assessed at any time on or before June 30, 1949. By reason of said written agreement between the parties and the provisions of Section 322(b)(3) of the Internal Revenue Code of 1939, the time within which plaintiff might file a claim for refund of excess profits tax for the year ended December 31, 1943, was extended to December 31, 1949.

V.

By notice of deficiency duly mailed by the Commissioner to the plaintiff on May 28, 1948, including the explanatory statement attached thereto, the Commissioner notified plaintiff of his determination of deficiencies in its income tax liabilities for the taxable years 1943 and 1944 in the respective amounts of $1,068.61 and $2,262.52; of a deficiency in its excess profits tax liability for the taxable year 1944 in the amount of $78,224.98, and of an overassessment of its excess profits tax liability for the taxable year 1943 in the amount of $12,853.92, as shown by Pre-trial Exhibit No. 1, which is a true and correct copy of the notice of deficiency, inclusive of the explanatory statement, as aforesaid, so mailed by the Commissioner to the plaintiff on the date aforesaid. Said notice, including said explanatory statement, (Pre-trial Exhibit No. 1), is hereinafter referred to as the "notice of deficiency".

VI.

Said overassessment of $12,853.92 for the taxable

year ended December 31, 1943, was arrived at by the Commissioner of Internal Revenue by certain adjustments made by him in plaintiff's net income for the years 1943 and 1945, as set forth in said notice of deficiency, as follows:

Taxable Year Ended December 31, 1943
Adjustments to Net Income

Net income as disclosed by return		$138,362.94
Unallowable deductions and additional income:		
(a) Partnership income increased		37,040.92
(b) Sales omitted		378.61
(c) Bad debts decreased		7,505.33
(d) Unallowable expenses		12,284.81
(e) Inventories understated		17,510.32
Total		$213,082.93
Non-taxable income and additional deductions:		
(f) Bonuses accrued	$ 2,421.54	
(g) Depreciation increased	1,050.39	
(h) Net operating loss deduction	87,764.98	91,236.91
Net income, adjusted		$121,846.02

Computation of Net Loss Carry Back from Year 1945

Net income for year 1945 as disclosed by return		$(107,445.66)
Unallowable deductions and additional income:		
(a) Adjustment of inventories	$ 7,982.67	
(b) Unrecorded sales	23,573.47	
(c) Insurance on officer's life	1,213.92	
(d) Coos Bay option charged off	1,000.00	
(e) Unallowable expenses	7,729.46	
(f) Rents received	435.00	
(g) Contract income understated	10,754.90	
(h) Bonus Joe Sax	10,744.57	63,433.99
Total		$ (44,011.67)

Non-taxable income and additional deductions:		
(i) Contracts completed in 1944	$41,104.38	
(j) Additional depreciation	2,648.93	43,753.31
Net operating loss carry back		$ (87,764.98)

Said adjustments and computations above set forth, based upon the applicable tax rates for said years, resulted in the determination by the Commissioner, as stated above, that there had been an overassessment in plaintiff's 1943 excess profits tax in said sum of $12,853.92, which said amount is the correct amount of overassessment based on the above figures.

VII.

On August 23, 1948, plaintiff filed with The Tax Court of the United States in the case of A. G. Rushlight & Co., an Oregon corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent, at Docket No. 20053, a verified petition relating to plaintiff's income and excess profits tax liabilities for the taxable years 1943 and 1944, two copies of which were served upon the Commissioner by the Clerk of said Tax Court, in accordance with Rule 12 of the Rules of Practice of that court. A true and correct (photostatic) copy of the petition so filed by plaintiff with said court is attached hereto and made a part hereof as Pre-trial Exhibit No. 2.

VIII.

On August 6, 1953, The Tax Court of the United States entered its order in the proceeding at Docket No. 20053, captioned as aforesaid, in words and figures as follows:

"Order

"The above-entitled proceeding came on for hearing at Portland, Oregon, on July 21, 1953, on respondent's motion to dismiss the proceeding for lack of jurisdiction insofar as relief was prayed for in connection with petitioner's excess profits taxes for the taxable year ended December 31, 1943. The matter was argued by counsel for the parties and, it appearing that respondent did not determine a deficiency in excess profits taxes for the taxable year 1943 but did determine an overassessment for that year, the premises considered, it is

"Ordered: That the proceeding be and the same is hereby dismissed for lack of jurisdiction insofar as it relates to petitioner's excess profits taxes for the taxable year ended December 31, 1943."

IX.

(a) On July 21, 1953, there was filed with The Tax Court of the United States, sitting at Portland, Oregon, in the proceeding at Docket No. 20053, as aforesaid, the written stipulation of the parties to that proceeding, in words and figures as follows:

"Stipulation

"It is hereby stipulated and agreed:

"(a) That there is a deficiency in Federal income tax due from this petitioner for the taxable year 1943 in the amount of $1,647.44.

"(b) That there are deficiencies in Federal income tax, excess profits tax and penalties due from

this petitioner for the taxable year 1944, in the amounts as follows:

	Deficiency Tax	Sec. 293(a) Penalty
Income tax	$ 3,972.41	$ 143.70
Excess profits tax	59,264.07	3,694.62

"(c) That there is no section 293(b) penalty or section 291(a) penalty due from this petitioner for the taxable year 1944.

"It is hereby stipulated and agreed that effective upon the entry of the Court's decision, petitioner waives the restrictions, if any, contained in the applicable sections of the Internal Revenue Code and amendments thereto, upon the assessment and collection of said deficiencies in tax and penalties, plus interest as provided by law.

"It is further stipulated and agreed that the Court may deny petitioner's prayer for relief as contained in paragraph (a) of the petition herein, relating to excess profits tax for the taxable year 1943, on the ground that the Court is without jurisdiction thereof by reason of the fact that the Commissioner has not determined a deficiency in petitioner's excess profits tax for that taxable year." (The phrase "paragraph (a) of the petition herein", as contained in the last quoted paragraph, refers to paragraph (a) of plaintiff's prayer for relief appearing on page 17 of its petition so filed with the Tax Court on July 21, 1953. (See Pre-trial Exhibit No. 2.))

(b) On August 6, 1953, The Tax Court of the United States entered its decision in the proceeding

at Docket No. 20053, as aforesaid, in words and figures as follows:

"Decision

"That there is a deficiency in income tax for the taxable year 1943, in the amount of $1,647.44; that there are deficiencies in income tax, excess profits tax, and penalties due for the taxable year 1944, in the amounts as follows:

	Deficiency in Tax	Sec. 293(a) Penalty
Income tax	$ 3,972.41	$ 143.70
Excess profits tax	59,264.07	3,694.62

That there is no section 293(b) penalty or section 291(a) penalty due for the taxable year 1944."

Said decision became final on November 6, 1953.

X.

The deficiencies in income tax and excess profits tax and penalties as shown by the stipulation of the parties, referred to in paragraph IX(a), above, and by the decision of the Tax Court, referred to in paragraph IX (b), above, were and are the consequence of various income and expense adjustments and/or other changes agreed upon by and between the plaintiff and the Commissioner, as a result of the negotiations hereinafter referred to, between the plaintiff and the Commissioner, the latter acting through his then Technical Staff, as was and is also the overassessment and overpayment of plaintiff's excess profits tax liability for the taxable year 1943 in the amount of $65,905.29, as aforesaid.

Based upon the income and/or other adjustments

so agreed upon and made, as aforesaid, the plaintiff and the Commissioner agreed that there was an overassessment and overpayment of excess profits tax for the taxable year 1943 of $65,905.29, as shown in agreement entered into by the plaintiff and the Commissioner on August 28, 1953, referred to in paragraph XI (i) of this Pre-trial Order, as Pre-trial Exhibit No. 3.

XI.

The adjustments referred to in paragraph X, above, were made in respect of the Commissioner's determinations as set forth in the notice of deficiency (Pre-trial Exhibit No. 1). The following schedule shows (1) the adjustment items appearing in the notice of deficiency in respect of which changes were made in arriving at the aforesaid agreed upon deficiencies and overpayment; (2) the allegations in plaintiff's Tax Court petition concerning the same, and (3) the action taken by the Commissioner thereon:

[Note: Adjustment Items, Plaintiff's Allegations and Action of Commissioner Thereon for Years 1943 an 1945 are set out at pages 51-63 of this printed record except paragraph (i) which is set out below.]

(i) The adjustments and/or changes described in subparagraphs (a) to (h), inclusive, of this paragraph, are the adjustments and/or changes referred to in paragraph X, above, which resulted, inter alia, in the overassessment and overpayment of excess profits tax of $65,905.29 for the year 1943, as set forth in paragraph X, above. Pre-trial Exhibit No.

3 is a true and correct copy of an agreement entered into between the plaintiff and the Commissioner on August 28, 1953, relating to said overassessment and overpayment of excess profits tax of $65,905.29 for the year 1943.

XII.

(a) On line 38 of its income and declared value excess profits tax return for the year 1945, plaintiff reported an adjusted net loss of $107,445.66. In computing the said loss of that amount, the plaintiff reported as income the sum of $42,789.78 as representing the total amount of profit derived by it during that year from two contracts performed by it for Oregon Shipyards. In the notice of deficiency, the Commissioner determined that of the income of $42,789.78, so reported by plaintiff for the year 1945, the sum of $41,104.38 should have been reported as income derived by it from said contracts during the year 1944. In its Tax Court petition, as aforesaid, plaintiff assigned error in respect of the Commissioner's determination, as set forth in this subparagraph, in words and figures as follows:

"(f) Respondent erred in his determination that gain on completed contracts of petitioner should be reallocated as to taxable years as follows:

"Year ended December 31, 1944, increase in income, $41,104.58.

"Year ended December 31, 1945, decrease in income, $41,104.58."

In arriving at the deficiencies in income tax and

excess profits tax for the year 1944 in the respective amounts of $3,972.41 and $59,264.07, as shown by the stipulation of the parties and the decision of the Tax Court entered pursuant thereto, as set forth in paragraph IX (a) and (b), above, no adjustment or change was made with respect to the Commissioner's determination as to the treatment of the profit derived by plaintiff from the two Oregon Shipyards contracts referred to in this subparagraph.

(b) In arriving (1) at the deficiency in income tax for the year 1943 in the amount of $1,647.44, as shown in the stipulation of the parties and the decision of the Tax Court entered pursuant thereto, as set forth in paragraph IX (a) and (b), above, and (2) at the overassessment and overpayment of excess profits tax for that taxable year of $65,-905.29, referred to on page 1 and paragraph XI (i), pages 13 and 14, above, the Commissioner determined and allowed as a deduction for that taxable year a net operating loss carry-back from the year 1945 in the amount of $108,805.33. In the computation of said net operating loss carry-back of $108,-805.33, no adjustment or change was made with respect to the Commissioner's determination as to the treatment of the profit derived by plaintiff from the two Oregon Shipyards contracts referred to in subparagraph (a), above.

XIII.

(a) Plaintiff reported an excess profits tax liability of $96,802.87 on its excess profits tax return

for the taxable year 1943. If the $41,104.38 profit derived from the Oregon Shipyards contracts, referred to in paragraph XII, above, had been reported by plaintiff on its return for the year 1944, instead of the year 1945, as aforesaid, and no adjustment of income otherwise reported by plaintiff, either in the year 1943 or 1945, had been made by the Commissioner, then and in that event the excess profits tax liability as reported on plaintiff's return for the year 1943, computed on that basis, would have been $67,207.72, instead of $96,802.87, as aforesaid; and the overpayment for that year would have been $36,310.14, instead of $65,905.29, as aforesaid.

(b) If, in addition to the various income and expense adjustments and/or other changes referred to in paragraphs X and XI, above, the Oregon Shipyards contracts item of $41,104.38 had, as a result of the negotiations referred to in those paragraphs, been treated as income includible in plaintiff's taxable income for the year 1945, instead of the year 1944, as aforesaid, then and in that event the excess profits tax liability of plaintiff for the taxable year 1943, computed on that basis, would have been $64,879.99, instead of $96,802.87, as aforesaid; and the overpayment for that year would have been $31,902.88, instead of $65,905.29, as aforesaid.

(c) Of the deficiency in excess profits tax for the taxable year 1944 in the amount of $59,264.07, referred to in paragraph IX (a) and (b), above,

the sum of $35,144.25 is attributable to the $41,-104.38 Oregon Shipyards contracts item adjustment referred to in paragraph XII (a) and (b), above.

(d) Attached hereto and made a part hereof as Pre-trial Exhibit No. 4 is a true and correct (photostat) copy of the '"Audit Statement", consisting of 32 pages, prepared in the Portland, Oregon, office of the Appellate Division, Internal Revenue Service, during the month of August 1953, for the purpose of giving effect to the various agreed upon income and expense adjustments and/or the changes referred to and discussed in paragraphs X, XI and XII, above. This pre-trial exhibit (No. 4) represents and is the computation by which effect was given to said agreed upon adjustments, resulting in (1) the deficiencies in income tax and excess profits tax and penalties as shown by the stipulation of the parties, referred to in paragraph IX (a), above, and by the decision of the Tax Court, referred to in paragraph IX (b), above, and (2) in the overassessment and overpayment of excess profits tax for the year 1943 in the amount of $65,905.29, hereinabove referred to. This Pre-trial Exhibit No. 4 is the document referred to as an "audit statement" in plaintiff's claim for refund for the year 1943, filed on January 5, 1954, a copy of which claim for refund has been made a part of this Pre-trial Order as Pre-trial Exhibit No. 5.

XIV.

Plaintiff's Tax Court petition, filed, as stated in paragraph VII, above, on August 23, 1948, together

with the file in said case, was, by the Commissioner of Internal Revenue, transmitted to the Portland, Oregon, office of the then Technical Staff of the Treasury Department of the United States on September 9, 1948. At the same time, the Commissioner transmitted to said Technical Staff certain petitions and files in regard to the following related docketed and nondocketed cases for the taxpayers and years shown:

Docketed Tax Court Cases	Years
Juanita Investment Company vs. Commissioner of Internal Revenue, Docket No. 20020	1942, 1944
Juanita R. Leggett vs. Commissioner of Internal Revenue, Docket No. 20021	1943
W. A. Rushlight and Betty Rushlight vs. Commissioner of Internal Revenue, Docket No. 20022	1944
W. A. Rushlight vs. Commissioner of Internal Revenue, Docket No. 20023	1943
Nondocketed Cases	
Raymond Rushlight	1943
Betty Rushlight	1943

In connection with all of said cases, including plaintiff's case, the taxpayers at all times between September 12, 1947 and August 24, 1951, were represented by Eric Van, a certified public accountant, and at all times between September 12, 1947 and December 2, 1950, by Carl E. Davidson, a lawyer, both of whom were admitted to practice before the Treasury Department. Meetings were held between said two representatives of plaintiff and representatives of the Technical Staff, Treasury Department, Portland, Oregon, sometimes both representatives of plaintiff being present and sometimes one only, on the following dates: November

4, 1948; January 14, 1949; May 24, 1949; August 22, 1949, and October 3, 1949; and thereafter, almost daily until about December 5, 1949. Thereafter, similar conferences were held as follows: In the year 1950, on February 10, April 3, May 9, July 5, September 7, September 30, October 13, December 1 and December 12; in the year 1951, on March 10, April 19, April 27, May 10 and June 22. Between June 22, 1951 and April 16, 1952, discussions continued between members of the Technical Staff and one of the officers of plaintiff as to items of gross income and deduction affecting all of the above cases. Commencing in June, 1953, a series of similar conferences were held with the substituted counsel for plaintiff and said other taxpayers. These conferences culminated, on or about July 21, 1953, in the settlement of all of the cases mentioned above, including plaintiff's case, which said settlement included the resulting overpayment for the year 1943, in the sum of $65,905.29, referred to hereinabove.

XV.

Of the above sum of $65,905.29, overpayment by plaintiff, there was refunded to plaintiff the amount of $35,044.35, this refund being made on November 8, 1953, by R. C. Granquist, District Director of Internal Revenue, said amount being the total of the payments made by plaintiff by way of credit on account of its 1943 excess profits tax assessment in the sums of $32,401.25 on April 9, 1952, $4,275.99 on April 23, 1952, and $593.19 on November 19, 1952, less the sum of $2,226.08. That said sum of

$2,226.08 represents interest from March 15, 1944 to March 15, 1946, on the sum of $18,550.66, which was the amount of deficiency in plaintiff's 1943 excess profits tax prior to the application thereto of the carry-back loss from the year 1945.

XVI.

The Commissioner of Internal Revenue and the District Director of Internal Revenue have failed and refused to refund to plaintiff the balance of said overpayments, namely, the sum of $30,860.94.

XVII.

On January 5, 1954, plaintiff filed with the Commissioner and/or the District Director, Internal Revenue Service, Portland, Oregon, a claim for refund of excess profits tax for the year 1943 in the amount of $66,832.82, "or such other amount as is legally refundable", a true and correct (photostat) copy of which is attached hereto and made a part hereof as Pre-trial Exhibit No. 5. By letter dated April 20, 1954 a true and correct (photostat) copy of which is attached hereto and made a part hereof as Pre-trial Exhibit No. 6, said Commissioner and/or District Director advised plaintiff, in substance, that said claim for refund would be disallowed in full; and by registered letter dated June 1, 1954 a true and correct (photostat) copy of which is attached hereto and made a part hereof as Pre-trial Exhibit No. 7, said Commissioner and/or District Director notified plaintiff, in the manner as provided by Section 3772(a)(2) of

the Internal Revenue Code of 1939, that said claim was thereby so disallowed.

XVIII.

On November 12, 1953, the deficiencies in income tax, excess profits tax and penalties for the years 1943 and 1944, as shown by the stipulation of the parties, referred to in paragraph IX (a), above, and by the decision of the Tax Court, referred to in paragraph IX (b), above, were assessed against plaintiff by the Commissioner in accordance with the provisions of Section 272(b) of the Internal Revenue Code of 1939.

Plaintiff's Contentions

I.

That its petition in the Tax Court referred to in paragraphs VII and VIII constitued a claim for the refund of the balance of the agreed overpayment, both within the meaning of Section 322 of the Internal Revenue Code and the regulations of the Treasury Department promulgated thereunder, and also under Section 3771(e) of the Internal Revenue Code; and that plaintiff is entitled to judgment against the defendant in the sum of $30,860.94, together with interest thereon at the rate of 6% per annum from August 23, 1948, to November 12, 1953; and plaintiff is also entitled to interest at 6% per annum on the following sums heretofore paid plaintiff (by way of credit) from the dates of payments by plaintiff to the dates of repayment to plaintiff, that is to say, on the sum

of $32,401.25 from April 9, 1952 to November 12, 1953; on the sum of $4,275.99 from April 23, 1952 to November 12, 1953; and on the sum of $593.19 from November 19, 1952 to November 12, 1953.

II.

That in acting upon and investigating the claim in plaintiff's Tax Court petition, in which it was alleged that there was an overassessment in plaintiff's 1943 excess profits tax returns, the Commissioner of Internal Revenue waived any requirement that plaintiff file any other or different claim for refund than that included in plaintiff's said petition, and plaintiff is entitled to judgment for the amounts set forth in Contention No. 1.

III.

Independently of the above contentions, plaintiff contends that its petition in the Tax Court constituted a demand on the Commissioner of Internal Revenue that there be refunded to plaintiff excess profits taxes which had been illegally assessed and collected from it for the reasons set forth in said petition. That the Commissioner of Internal Revenue had under consideration all of the matters referred to in said petition until approximately July 21, 1953, at which time the plaintiff and the Commissioner reached an account stated, and it was agreed that there had been an overassessment and overpayment of excess profits taxes for the year ending December 31, 1943, in the sum of $65,905.29. That no portion of said sum had

December 31, 1943, within the provisions of Section 322 of the Internal Revenue Code of 1939 and as required by Section 3772 of the Internal Revenue Code of 1939.

II.

Defendant contends that the Commissioner of Internal Revenue and/or his officers or agents have not by their actions waived the requirement of the filing of a proper claim for refund.

III.

Defendant contends that the Commissioner of Internal Revenue and the plaintiff did not on or about July 21, 1953, nor at any time, reach an account stated in respect to the overassessment or overpayment of excess profits taxes for the year ended December 31, 1943.

IV.

Defendant contends that the decision of the Tax Court did not render Section 3801 of the Internal Revenue Code of 1939 applicable.

V.

Defendant contends that it should not be required to apply any part of the overassessment or overpayment of excess profits taxes for the year ended December 31, 1943, not heretofore refunded to plaintiff, to unpaid deficiencies in plaintiff's excess profits taxes for the year ended December 31, 1944.

VI.

Defendant contends that the Commissioner of

Internal Revenue properly applied $2,226.08 of the overassessment and overpayment of excess profits taxes for the year ended December 31, 1943, as interest on the unassessed deficiency of excess profits taxes for the period from March 15, 1944 to March 15, 1946.

Issues

I.

Did plaintiff's Tax Court petition constitute a proper claim for refund under the provisions of Sections 322, 3771(e) and 3772 of the Internal Revenue Code of 1939?

II.

Did the agreement between plaintiff and defendant dated August 28, 1953, constitute an account stated?

III.

Did defendant waive the requirement that a claim for refund be filed?

IV.

Was the time for filing a claim for refund extended by reason of the decision of the Tax Court and Section 3801 of the Internal Revenue Code of 1939 with respect to plaintiff's overassessment and overpayment of its excess profits taxes for its year ended December 31, 1943?

V.

Is plaintiff entitled to have any portion of the overassessment and overpayment in its 1943 excess profits taxes set off against the unpaid deficiency in its 1944 excess profits taxes?

VI.

In any event did the Commissioner of Internal Revenue properly reduce the amount otherwise determined to be refundable by him by the amount of $2,226.08, being the interest on the unassessed deficiency in plaintiff's 1943 excess profits taxes?

Exhibits

The following exhibits are below enumerated and identified. No further identification of these exhibits will be required, and it is stipulated between the parties that the documents are authentic and in the case of copies that they are true copies of the original, and that said exhibits shall be admitted without objection except as to irrelevancy:

1. Notice of deficiency dated May 28, 1948.
2. Petition in Tax Court.
3. Agreement between plaintiff and defendant as to amount of overassessment, dated August 28, 1953.
4. Audit statement.
5. Claim for refund dated December 29, 1953.
6. Letter dated April 20, 1954.
7. Letter dated June 1, 1954.

It Is Hereby Ordered, Considered and Adjudged that all pleadings herein shall be amended to conform to this pre-trial order and that this order shall supersede said pleadings and set forth all issues in this action. This pre-trial order shall not be amended except by consent, or to prevent manifest injustice.

Dated this 8th day of February, 1956.

/s/ CHASE A. CLARK,
District Judge

Approved:

/s/ DENTON G. BURDICK, JR.,
Of Attorneys for Plaintiff

/s/ EDWARD J. GEORGEFF,
Of Attorneys for Defendant

[Endorsed]: Filed February 8, 1956.

[Title of District Court and Cause.]

OPINION

Hutchinson, Schwab and Burdick, Denton G. Burdick, Jr., Portland, Oregon, Attorneys for Plaintiff.

Charles K. Rice, Assistant Attorney General, Andrew D. Sharpe, Allan A. Bowden, David R. Frazer, Attorneys, Dept. of Justice, Washington, D. C., C. E. Luckey, United States Attorney for Oregon, Edward J. Georgeff, Assistant United States Attorney for Oregon, Portland, Oregon, Attorneys for Defendant.

Clark, D. J.

The taxpayer, A. G. Rushlight & Co., timely filed with the Collector of Internal Revenue for the District of Oregon, its corporation excess profits tax return for the year 1943 showing a liability of $96,802.87.

This amount was duly paid or credited against

outstanding taxes for other years and waivers were timely filed extending the assessment period to June 30, 1949. By reason of these waivers and the provisions of Section 322 (b)(3) of the Internal Revenue Code of 1939, the time for filing a refund claim for the year 1943 was extended for six months to December 31, 1949.

On May 28, 1948, the taxpayer was sent the statutory notice showing an income tax deficiency and an excess profits tax overassessment for 1943 and income tax and excess profits tax deficiencies for 1944.

August 23, 1948, the taxpayer filed a petition with the Tax Court for redetermination as to all of these matters. Various negotiations continued and were pending for the following five years. In 1953, on stipulation of the parties, the Tax Court dismissed the petition as it pertained to redetermination of the overassessment on the grounds that it lacked jurisdiction.

On July 5, 1954, the taxpayer filed a formal claim for refund for 1943 excess profits taxes, alleging that the petition filed with the Tax Court was an informal refund claim, subject to amendment, and this claim as filed was such an amendment. On June 1, 1954, this claim for refund was rejected by the Commissioner, whereupon this suit was instituted by A. G. Rushlight and Co., taxpayer. This is only a brief summary of the facts the Court feels are most pertinent to its decision.

It is the government's contention that the petition filed with the Tax Court for the redetermina-

tion of 1943 and 1944 income tax deficiencies and 1943 excess profits tax overassessment cannot qualify as an informal claim for refund.

Sec. 322(b)(1) I.R.C. 1939 (26 U.S.C. 1952 ed., Sec. 322) provides that a claim for refund must be filed by the taxpayer within three years from the time the return was filed or within two years from the time the tax was paid and provision is also made for an extension of six months, which extension was made in this case.

Regulations 111, Sec. 29, 322-3, provides that the claim for refund shall be made on Form 843 and filed with the Collector of Internal Revenue. It is these regulations that the government contends have not been complied with during the statutory period and therefore, plaintiff cannot recover.

The taxpayer contends that its petition filed with the Tax Court within the statutory period, served as an informal claim which was perfected by the filing of the formal claim on January 5, 1954.

The Government concedes that if the taxpayer files an informal claim for refund with the Commissioner in writing, it may be sufficient to stay the statutory period within which a formal refund claim may be filed.

The regulations provide that the claim for refund should "set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof." In the case of Smale and Robinson, Inc. vs. U. S., 123 F. Supp. 457 at 470

the Court, quoting Judge Prettyman in Keneipp vs. U. S., 184 F.2d 263 at 267, said:

> "Claim for refund of federal excise profits taxes paid must be sufficient to advise the Commissioner of Internal Revenue as to items as to which taxpayer claims error and grounds upon which taxpayer makes his claim and if Commissioner understands grounds and deals with claim on basis of his understanding, claim is sufficient. A broad public policy is involved in this broad doctrine. Insistence upon nice technicalities of expression on the part of taxpayers in dealings with the Government concerning taxes must certainly compel taxpayers to deal with the Government through technicians. The Bureau of Internal Revenue has long sought to encourage a direct informal and non-technical presentation."

Certainly the petition filed gave sufficient notice and set forth the claim adequately.

It seems to be the government's theory that, while the petition might have served as an informal claim, if filed with the Commissioner, it did not because it was filed with the Tax Court; the former being an administrative agency under the executive branch of the Government and the latter coming under the judiciary branch. This might be a general rule, but the facts of each individual case should determine its particular status.

The letter of May 28, 1948, advising the taxpayer of deficiencies in income tax for 1943 and 1944, and the overassessment on excess profits tax

for 1943, with which we are here concerned, is, in this Court's opinion, ambiguous and misleading as to what steps the taxpayer should take.

Conspicuously attached to the front of the letter is a notice advising the taxpayer that if he decides to initiate a proceeding before the Tax Court, for a redetermination of deficiency he must do so within ninety days by filing the same with the Tax Court in Washington. The notice then says that under no circumstances should a petition for redetermination be forwarded to the Commissioner or Collector of Internal Revenue.

The letter itself continues on and says "Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in charge, Seattle, Washington." The taxpayer is also advised that the signing of this form will expedite the closing of their returns.

The statement, also enclosed with the letter, states:

> "The overassessment shown herein will be made the subject of a certificate of overassessment which will reach you in due course, * * * and will be applied * * * provided that you fully protect yourself against the running of the statute of limitations * * * by filing with the collector of internal revenue for your district, a claim for refund on Form 843, a copy of which is enclosed * * *".

This Court feels no amazement, taking into consideration all this correspondence—notices, letters,

statements, etc.,—that this taxpayer failed to execute the claim for refund relating to the overassessment and file the same with the local collector, but rather filed a petition with the Tax Court for redetermination of all of the Commissioner's findings.

The other happenings which the Court feels are pertinent are (1) the Tax Court served two copies of the petition on the Commissioner who thereupon forwarded same to the Portland office; and (2) Whether as a result of that petition or not, the Commissioner did, over a period of years, investigate the matters set forth in the petition, as though it were a claim for refund. When the amount of the overassessment and overpayment was agreed upon in 1953, it was then discovered that the Plaintiff had not filed Form 843. The taxpayer then executed said Form as an Amended Claim for Refund.

The Court can understand that in the event a petition, even though adequate for an informal claim for refund, was filed with the Tax Court but never reached the Commissioner, the Commissioner would have no notice and the statutory and regulatory provisions would not have been fulfilled. However, such is not the case here. The petition, along with other allegations, sets forth the matters relating to the overassessment and overpayment and, the Court feels, may be considered as an informal claim for refund.

Further, although not filed with the Commissioner, it reached his hands and the Court considers

this adequate, under the facts as set forth herein, to meet all the requirements. This Claim was perfected by the Amended Claim, filed on Form 843, after the statute of limitations had run.

While not complying with all the technicalities of the Regulations, the taxpayer acted in good faith, and while he perhaps erred technically, still the end purpose was accomplished. Good conscience will not permit this Court to penalize the taxpayer in such a situation. Therefore, the taxpayer is entitled to recover the balance of $30,860.94, representing a part of an overpayment of excess profits tax liability for 1943, the remainder of which has been refunded.

Counsel for Plaintiff may prepare Findings of Fact, Conclusions of Law and Judgment in accordance herewith, submitting the original to the Court and serving a copy on opposing counsel.

[Endorsed]: Filed August 31, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: A. G. Rushlight & Co., an Oregon corporation, Plaintiff, and Hutchinson, Schwab and Burdick; Denton G. Burdick, Jr., Attorneys for Plaintiff, 420 Equitable Building, Portland 4, Oregon:

Notice is hereby given that the United States of America, defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment contained in the

opinion of Chase A. Clark, United States District Judge, filed in the within action and docketed on August 31, 1956, in favor of plaintiff and against defendant.

Dated October 29, 1956, at Portland, Oregon.

C. E. LUCKEY,
United States Attorney, District of Oregon

/s/ EDWARD J. GEORGEFF,
Assistant United States Attorney,
Of Attorneys for Defendant

[Endorsed]: Filed October 29, 1956.

[Title of District Court and Cause.]

ORDER

This matter coming on to be heard ex parte upon motion of defendant for an order extending time for the filing of the record on appeal and docketing the within action in the United States Court of Appeals for the Ninth Circuit, to enable The Solicitor General to have additional time to consider said appeal, and the Court being fully advised in the premises,

It Is Ordered that the time for filing the record on appeal and docketing the within action be and it is hereby extended to ninety days from October 29, 1956, the date of filing of the Notice of Appeal.

Dated this 5th day of December, 1956.

/s/ CHASE A. CLARK,
Judge

[Endorsed]: Filed December 6, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action came on for trial before the court on the pre-trial order heretofore entered, the testimony adduced by the parties, and the exhibits introduced at the trial, plaintiff appearing by Denton G. Burdick, Jr., one of its attorneys, and the defendant appearing by Allen Bowden, attorney, Department of Justice, and Edward J. Georgeff, Assistant United States Attorney for the District of Oregon. The court having considered said pre-trial order and the agreed facts therein contained, the testimony and exhibits introduced at the trial, and the briefs of counsel, and having previously rendered its opinion herein, and being full advised in the premises, makes the following

Findings of Fact

I.

Plaintiff was and is a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its office and principal place of business in the City of Portland, County of Multnomah and State of Oregon. The defendant United States of America was and now is a corporation sovereign and a body politic.

II.

James W. Maloney was, from July 17, 1933 to September 1, 1947, the Collector of Internal Rev-

enue for the District of Oregon, and Hugh H. Earle was, from September 1, 1947 to October 30, 1952, the Collector of Internal Revenue for the District of Oregon. At all times subsequent to October 30, 1952, R. C. Granquist has been, and now is, the District Director of Internal Revenue for the District of Oregon.

III.

Plaintiff timely filed with the then Collector of Internal Revenue for the District of Oregon its corporation excess profits tax return for the taxable year 1943, disclosing thereon an excess profits tax liability of $96,802.87, which amount was duly assessed by the Commissioner against the plaintiff and was paid by the latter on the dates and in the amounts as follows:

Collector or Director to whom Paid	Date of Payment	Amount of Payment
James W. Maloney	March 15, 1944	$ 3,988.60
James W. Maloney	July 5, 1944	4,412.83
James W. Maloney	October 26, 1944	16,046.93
James W. Maloney	November 25, 1944	10,000.00
James W. Maloney	March 13, 1945	25,084.08
Hugh H. Earle	April 9, 1952 By way of credit	32,401.25
Hugh H. Earle	April 23, 1952 By way of credit	4,275.99
R. C. Granquist	November 19, 1952 By way of credit	593.19

IV.

Prior to the expiration of the time prescribed in Section 275 of the Internal Revenue Code of 1939 for the assessment of excess profits taxes, the Commissioner of Internal Revenue and the plaintiff,

pursuant to §276 (b) of said Code, agreed in writing that excess profits taxes due from plaintiff for the year ended December 31, 1943, might be assessed at any time on or before June 30, 1949. By reason of said written agreement between the parties and the provisions of §322 (b)(3) of the Internal Revenue Code of 1939, the time within which plaintiff might file a claim for refund of excess profits tax for the year ended December 31, 1943, was extended to December 31, 1949.

V.

By notice of deficiency duly mailed by the Commissioner to the plaintiff on May 28, 1948, including the explanatory statement attached thereto, the Commissioner notified plaintiff of his determination of deficiencies in its income tax liabilities for the taxable years 1943 and 1944 in the respective amounts of $1,068.61 and $2,262.52; of a deficiency in its excess profits tax liability for the taxable year 1944 in the amount of $78,224.98, and of an overassessment of its excess profits tax liability for the taxable year 1943 in the amount of $12,853.92.

VI.

Said overassessment of $12,853.92 for the taxable year ended December 31, 1943, was arrived at by the Commissioner of Internal Revenue by certain adjustments made by him in plaintiff's net income for the years 1943 and 1945, as set forth in said notice of deficiency, as follows:

Taxable Year Ended December 31, 1943
Adjustments to Net Income

Net income as disclosed by return		$138,362.94
Unallowable deductions and additional income:		
(a) Partnership income increased		37,040.92
(b) Sales omitted		378.61
(c) Bad debts decreased		7,505.33
(d) Unallowable expenses		12,284.81
(e) Inventories understated		17,510.32
Total		$213,082.93
Non-taxable income and additional deductions:		
(f) Bonuses accrued	$ 2,421.54	
(g) Depreciation increased	1,050.39	
(h) Net operating loss deduction	87,764.98	91,236.91
Net income, adjusted		$121,846.02

Computation of Net Loss Carry Back from Year 1945

Net income for year 1945 as disclosed by return		$(107,445.66)
Unallowable deductions and additional income:		
(a) Adjustment of inventories	$ 7,982.67	
(b) Unrecorded sales	23,573.47	
(c) Insurance on officer's life	1,213.92	
(d) Coos Bay option charged off	1,000.00	
(e) Unallowable expenses	7,729.46	
(f) Rents received	435.00	
(g) Contract income understated	10,754.90	
(h) Bonus Joe Sax	10,744.57	63,433.99
Total		$ (44,011.67)
Non-taxable income and additional deductions:		
(i) Contracts completed in 1944	$41,104.38	
(j) Additional depreciation	2,648.93	43,753.31
Net operating loss carry back		$ (87,764.98)

Said adjustments and computations above set forth, based upon the applicable tax rates for said years,

resulted in the determination by the Commissioner, as stated above, that there had been an overassessment in plaintiff's 1943 excess profits tax in the sum of $12,853.92, which said amount is the correct amount of overassessment based on the above figures.

VII.

On August 23, 1948, plaintiff filed with The Tax Court of the United States in the case of A. G. Rushlight & Co., an Oregon corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent, at Docket No. 20053, a verified petition relating to plaintiff's income and excess profits tax liabilities for the taxable years 1943 and 1944, two copies of which were served upon the Commissioner by the Clerk of said Tax Court, in accordance with Rule 12 of the Rules of Practice of that court.

In addition to the allegations set forth in paragraph XI of these findings, said petition contained the following allegations:

"(k) Respondent erred in his determination that there is an overassessment of only $12,853.92 in petitioners excess profits tax for the taxable year ended December 31, 1943, and in failing and refusing to find that there was an overassessment of not less than $54,218.68 in petitioner's excess profits tax for such year."

"(a) That there is an over-assessment in petitioner's excess profits tax for the taxable year ended December 31, 1943 of not less than $54,218.68 for said year;"

VIII.

On August 6, 1953, The Tax Court of the United States entered its order in the proceedings at Docket No. 20053, dismissing the proceedings insofar as they related to the plaintiff's excess profits taxes for the taxable year ended December 31, 1943.

IX.

On July 21, 1953, the parties to the proceeding in The Tax Court of the United States, in the proceeding at Docket No. 20053, stipulated that there was a deficiency in federal income tax due from plaintiff for the taxable year 1943 in the amount of $1,647.44, and that there was deficiencies in federal income tax, excess profits tax and penalties due from plaintiff for the taxable year 1944 as follows:

	Deficiency Tax	Sec. 293(a) Penalty
Income tax	$ 3,972.41	$ 143.70
Excess Profits tax	59,264.07	3,694.62

On August 6, 1953, The Tax Court of the United States entered its decision in the proceeding at Docket No. 20053 that there were deficiencies due from plaintiff in said amounts. Said decision became final on November 6, 1953.

X.

The deficiencies in income tax and excess profits tax and penalties stipulated by plaintiff and the Commissioner and incorporated in the decision of the Tax Court were and are the consequence of various income and expense adjustments and/or other changes agreed upon by and between the

plaintiff and the Commissioner, as a result of negotiations between the plaintiff and the Commissioner, the latter acting through his then Technical Staff, as was and is also the overassessment and overpayment of plaintiff's excess profits tax liability for the taxable year 1943 in the amount of $65,905.29 as hereinafter found.

Based upon the income and/or other adjustments so agreed upon and made, the plaintiff and the Commissioner agreed that there was an overassessment and overpayment of excess profits tax for the taxable year 1943 of $65,905.29, and on August 28, 1953, plaintiff and the Commissioner entered into an agreement in writing to that effect.

XI.

The adjustments referred to in paragraph X above were made in respect of the Commissioner's determinations as set forth in the notice of deficiency. The following schedule shows (1) the adjustment items appearing in the notice of deficiency in respect of which changes were made in arriving at the aforesaid agreed upon deficiencies and overpayment; (2) the allegations in plaintiff's Tax Court petition concerning the same, and (3) the action taken by the Commissioner thereon:

Year 1943

(a) Partnership income increased (per deficiency notice) $37,040.92.

Allegations in Tax Court Petition:

"(a) The Commissioner of Internal Revenue, hereinafter called 'respondent', erred in his de-

termination that partnership income of petitioner should be increased in the following amounts:

Taxable year ended December 31, 1943, $37,040.92 and in failing and refusing to find that petitioner properly reported its income from partnerships (joint ventures).

"(a-1) As stated in his notice of deficiency, the amounts comprising the item of partnership income erroneously added to income by the respondent are as follows:

Year ended December 31, 1943:	
Waale-Camplin Co.	$ 34,269.36
Defense Construction Co.	2,771.56
Total	$ 37,040.92

"(a-2) On December 23, 1942 and January 18, 1943, the petitioner and W. A. Rushlight Company, a partnership, and others entered into joint venture agreements with the Waale-Camplin Co. covering two contracts in connection with housing construction for the Vancouver Housing Authority.

"(a-3) Such joint ventures were managed by the Waale-Camplin Co., all parties to profit, or assume losses in the proportion to their capital contributions to the venture, after allowance of management compensation to the Waale-Camplin Co.

"(a-4) The capital contribution to the venture made by the A. G. Rushlight & Co. and the W. A. Rushlight Company was made jointly from borrowed funds. Said funds were borrowed in the name of the A. G. Rushlight & Co. but the said W. A.

Rushlight Company, through its partners, were also guarantors of said loans.

"(a-5) The earnings of the venture for the year ended December 31, 1943, attributable to the joint venture interest of petitioner were $34,269.37, and were included in its books and tax returns for the said year.

"(a-6) In his examination of petitioner's returns for that year, respondent has arbitrarily and erroneously added to petitioner's income the share of income from said joint venture attributable to the joint venture interest of the partnership W. A. Rushlight Company."

Action by Commissioner:

(a) As a result of the negotiations referred to in paragraph X above, the Commissioner conceded the plaintiff's contention that the item of $34,269.36 was not income of the plaintiff for the year 1943 and that said amount had been erroneously added to its income for that year in the notice of deficiency. Plaintiff's excess profits net income for the year 1943, as shown by the notice of deficiency, was accordingly decreased by that amount.

(b) Bad debts decreased (per notice of deficiency) $7,505.33.

Allegations in Tax Court Petition:

"(d) Respondent erred in his determination that the bad debts claimed by petitioner in its returns for the taxable year ended December 31, 1943, should be decreased by $7,505.33; and in failing and refusing to hold that the bad debts claimed by peti-

tioner in said returns should be decreased by no more than $1,750.00.

* * * * *

"(d) During the year ended December 31, 1942, petitioner advanced funds, in connection with the development of a manganese property by the Manganese Mining and Manufacturing Company in the amount of $7,505.33, and subsequently recovered amounts aggregating $1,750.00, a net advance of $5,755.33. That company became insolvent in 1943 and the debt was charged off the books, as a bad debt. No recovery was made on said account, except as stated."

Action by Commissioner:

As a result of the negotiations referred to in paragraph X, above, the Commissioner conceded plaintiff's contention that the account of Manganese Mining and Manufacturing Co. was allowable as a bad debt deduction for the year 1943 in the amount of $5,755.33. Plaintiff's excess profits net income for the year 1943, as shown by the notice of deficiency, was accordingly decreased by that amount.

(c) Unallowable expenses (per notice of deficiency) $12,284.81.

Allegations in Tax Court Petition:

"(c) The respondent erred in his determination that there were unallowable expenses claimed by petitioner in its returns as follows:

Taxable year ended December 31, 1943, $12,-284.81, * * * and in failing and refusing to find that

such unallowable expenses were not in excess of the following amounts:

Year ended December 31, 1943, $5,186.97.

* * * * *

"(c-1) No detail is given, in respondent's notice of deficiency of the items considered by him to be in the nature of unallowable expenses, except for the explanation 'personal and farm expenses of W. A. Rushlight are not deductible' and similar language. The only information which taxpayer has as to the possible nature of such items was obtained in informal conferences with a representative of the Treasury Department, from whom the following general segregation was secured:

	1943
Personal items of W. A. Rushlight	$ 1,478.12
Personal items of Mrs. W. A. Rushlight	119.72
Ocean Park farm expense	3,370.02
Fixed assets charged to expense	1,816.95
Payment to Earl Wilkinson	5,500.00
***	
Total	$12,284.81

*** ***

"(c-2) Petitioner is unable to identify the items alleged to be 'personal items of W. A. and Mrs. W. A. Rushlight' and petitioner believes and therefore alleges that the majority of said items to be club dues and expenses incurred for the sole benefit of the business and properly allowable as deductions.

* * * * *

"(c-8) Earl Wilkinson, a Portland, Oregon, banker, rendered valuable services to petitioner in connection with financing, formation of joint ventures and advice as to contract procedure, giving freely of his own time and efforts. The charge for

his services was reasonable and constitutes an ordinary and necessary expense of conducting the business of petitioner for the year 1943."

Action by Commissioner:

As a result of the negotiations referred to in paragraph X, above, the Commissioner conceded the plaintiff's contentions to the following extent: (1) That the "Earl Wilkinson" item of $5,500.00 represented an allowable deduction as fees and commissions paid to the extent and in the amount of $4,500.00, and (2) that of the four remaining items mentioned above, the sum of $1,210.37 represented an allowable deduction as and for expenses incurred by plaintiff's president, W. A. Rushlight, in the conduct of its business. Plaintiff's excess profits net income for the year 1943, as shown by the notice of deficiency, was accordingly decreased by the amount of $5,710.37.

Year 1945

(Affects 1943 tax in view of loss carry back provisions)

(d) Unrecorded sales (per notice of deficiency) $23,573.47.

Allegations of Tax Court Petition:

"(b) The respondent erred in his determination that there were the following unrecorded sales not reported on petitioner's returns:

* * * * *

Taxable year ended December 31, 1945, $23,573.47, and in failing and refusing to find that sales of petitioner which were not recorded on the books

in error amounted to * * * $16,593.30 for the year 1945.

"(b-1) Examination of respondent's notice of deficiency fails to disclose details as to the alleged sales not reported by petitioner for the years ended December 31, * * * 1945, except the statement that such sales were to W. A. Rushlight, and to Rushlight Steel. The only information which petitioner has as to the nature of these items was furnished to it in informal conferences held with a representative of the Treasury Department as follows:

	Cost	Profit Added	Sales
Sales to W. A. Rushlight:			
* * * $	* * *		* * *
Year 1945	366.09	164.74	530.83
Sales to Rushlight Steel:			
* * *	* * *	* * *	* * *
Year 1945	16,227.21	6,815.43	23,042.64

"(b-2) The item entitled 'Sales to Rushlight Steel' apparently represents items determined by the respondent to represent work performed by the petitioner for Rushlight Steel Works, a division of the partnership of W. A. Rushlight Company, which were not charged to that company. The petitioner is unable to identify all of these items but is informed, believes, and therefore alleges that any such omissions were due to bookkeeping errors.

"(b-3) Respondent, in making his determination as to sales not reported, arbitrarily added to costs of items considered as sales not billed an allowance for profit. Since the work done for the said Rushlight Steel Co. which should have been billed was in the nature of an accommodation, the re-

spondent's determination in this regard was unwarranted and without foundation in fact."

Action by Commissioner:

As a result of the negotiations referred to in paragraph X above, the Commissioner conceded the plaintiff's contention that the item of "Unrecorded sales", as shown in the notice of deficiency, should be reduced by the sum of $6,980.17, and that plaintiff's operating loss for the year 1945 should, therefore, be increased by that amount, with the result that its excess profits net income for the year 1943 was reduced by the same amount, i.e., $6,980.17.

(e) Unallowable expenses (per deficiency notice) $7,729.46.

Allegations of Tax Court Petition:

"(c) The respondent erred in his determination that there were unallowable expenses claimed by petitioner in its returns as follows:

* * * * *

Taxable year ended December 31, 1945, $7,729.46.

"(c-1) No detail is given, in respondent's notice of deficiency of the items considered by him to be in the nature of unallowable expenses, except for the explanation 'personal and farm expenses of W. A. Rushlight are not deductible' and similar language. The only information which taxpayer has as to the possible nature of such items was obtained in informal conferences with a representative of the Treasury Department, from whom the following general segregation was secured:

* * * * * * 1945

Personal items of W. A. Rushlight	$ 293.52
Personal items of Mrs. W. A. Rushlight	21.18
Ocean Park farm expense	849.52
* * *	
Legal expense—C. C. Hall	5,000.00
Rushlight Steel Co. expenses	165.24
Philippine Construction and Development Company	500.00
* * *	

"(c-2) Petitioner is unable to identify the items alleged to be 'personal items of W. A. and Mrs. W. A. Rushlight' and petitioner believes and therefore alleges that the majority of said items to be club dues and expenses incurred for the sole benefit of the business and properly allowable as deductions.
* * * * *

"(c-10) The legal fees to C. C. Hall represent a retainer fee of $500.00 per month for ten months of the year 1945, as arranged with him. He was and is the petitioner's legal counsel and has rendered valuable services to petitioner. The amount due, as agreed, was accrued on the books and deducted as an expense in the year 1945, was due within that year, and such amount as has not yet been paid is a bona fide debt of petitioner. Petitioner's books are maintained on the accrual basis of accounting, and on the completed contract method, and, under that method of accounting, the services constituted a bona fide charge against completed contracts of the year.

"(c-11) The amount paid entitled 'Philippine Construction and Development Company' was paid, along with others to see what might be developed in the way of business in the Philippine Islands. No benefit was received from the expenditure, but the

amount is an ordinary and necessary expense of business development."

Action by Commissioner:

As a result of the negotiations referred to in paragraph X, above, the Commissioner conceded plaintiff's contentions to the extent (1) that the "Philippine Construction and Development Company" item of $500.00 represented an allowable deduction as and for business expense incurred in investigating the Philippine venture; (2) that the "Legal expense —C. C. Hall" item of $5,000.00 represented an allowable deduction as and for legal expenses incurred by plaintiff in connection with its business, and (3) that of the four remaining items, mentioned above, the sum of $396.38 represented an allowable deduction on account of business expenses incurred by plaintiff's president, W. A. Rushlight. The result of these concessions and adjustments was to increase plaintiff's operating loss for the year 1945 by the total amount of $5,896.38, and to reduce its excess profits net income for the year 1943 by the same amount, i.e., $5,896.38.

(f) Contract income understated (per deficiency notice) $10,754.90.

Allegations of Tax Court Petition:

"(h) Respondent erred in his determination that contract income for the year ended December 31, 1945 was understated by $10,754.90.

* * * * *

"(g-1) No details are given in respondent's notice of deficiency as to the amount of $10,754.90, alleged to be income from contracts completed, not

included in income. Reference is therefore made to information orally furnished petitioner by a representative of the Treasury Department at an informal conference for the following summary:

Logging contract on Juanita Investment Company property	$ 4,871.83
Underpricing of contracts to W. A. Rushlight Company	5,883.07
	$ 10,754.90

"(g-2) Petitioner engaged in logging timber from property owned by Juanita Investment Company on the basis that its compensation would come from sale of timber cut therefrom. The loss sustained was $4,871.83, the venture being abandoned in 1945 due to operating difficulties. No recovery was made from timber cut and left lying on said lands.

"(g-3) Petitioner engaged in a number of contracts during the year 1945 with W. A. Rushlight Company. Such contracts all resulted in losses and in settlement thereof, the W. A. Rushlight Company turned over to petitioner all of the contract prices which it received in payment for the said work. Respondent erred in arbitrarily determining that petitioner should have realized a profit at the expense of the W. A. Rushlight Company."

Action by Commissioner:

As a result of the negotiations referred to in paragraph X, above, the Commissioner conceded the plaintiff's contentions (1) that the "Logging contract on Juanita Investment Company property" item of $4,871.83 represented an allowable deduction as and for a loss sustained in connection with said logging contract, and (2) that the "Under-

pricing of contracts to W. A. Rushlight Company" item of $5,883.07 did not represent income and/or profit derived or received by plaintiff. The result of these concessions and adjustments was to increase plaintiff's operating loss for the year 1945 by the total amount of $10,754.90, and to reduce its excess profits income for the year 1943, as shown by the notice of deficiency, by the same amount, i.e., $10,754.90.

(g) Bonus, Joe Sax (per notice of deficiency) $10,744.57.

Allegations of Tax Court Petition:

"(i) Respondent erred in his determination that an alleged bonus to Joe Sax in the sum of $10,744.57 should be eliminated in the year 1945 as 'not deductible as no bonus payable for 1945' and in failing and refusing to find that no adjustment of bonus to Joe Sax was necessary as no bonus had been either claimed or accrued on the books for that year.

* * * * *

"(h) Joe Sax, an employee of petitioner engaged in technical duties relating to engineering, cost estimates, etc., received, in addition to other compensation, a bonus of 10% of the net profits of petitioner. For the year 1945, petitioner realized a substantial loss, and Joe Sax was not entitled in that year to a bonus, nor was he financially responsible, in accordance with his agreement with the company, for any of the loss sustained. Petitioner cannot understand the determination of respondent, who erred in reducing the loss of taxpayer by $10,744.57 with

the explanation 'bonus accrual not deductible as no bonus payable for 1945' as there was no bonus accrued, paid, or otherwise entered on the books or claimed as a deduction for that year."

Action by Commissioner:

As a result of the negotiations referred to in paragraph X, above, the Commissioner conceded the plaintiff's contention that he, the Commissioner, had erred in respect of the "Bonus, Joe Sax" item of $10,744.57, with the result that plaintiff's operating loss for the year 1945, as shown by the notice of deficiency, was understated by that amount, and that its excess profits net income for the year 1943, as shown by the notice of deficiency, was overstated by the same amount, i.e., $10,744.57.

(h) In addition to the adjustments hereinabove referred to in this paragraph, which operated in favor of the plaintiff, and as a further result of the negotiations referred to in paragraph X, above, the plaintiff conceded, in favor of the Commissioner, (1) that the deduction for depreciation for the year 1945, as reflected in the notice of deficiency, was overstated by the amount of $1,002.91, and (2) that its closing inventory for that taxable year, as so reflected in said notice of deficiency, was understated by the amount of $12,332.76. The result of these concessions and adjustments was to decrease plaintiff's operating loss for the year 1945 by the total amount of $13,335.67, and to increase its excess profits net income for the year 1943, as shown by the notice of deficiency, by the same amount, i.e., $13,335.67.

(i) As a result of the adjustments described in subparagraphs (a) to (h), inclusive, of this finding, there was an overassessment and overpayment of excess profits tax of $65,905.29 for the year 1943.

XII.

(a) On line 38 of its income and declared value excess profits tax return for the year 1945, plaintiff reported an adjusted net loss of $107,445.66. In computing the said loss of that amount, the plaintiff reported as income the sum of $42,789.78 as representing the total amount of profit derived by it during that year from two contracts performed by it for Oregon shipyards. In the notice of deficiency, the Commissioner determined that of the income of $42,789.78, so reported by plaintiff for the year 1945, the sum of $41,104.38 should have been reported as income derived by it from said contracts during the year 1944. In its Tax Court petition, as aforesaid, plaintiff assigned error in respect of the Commissioner's determination, as set forth in this subparagraph, in words and figures as follows:

"(f) Respondent erred in his determination that gain on completed contracts of petitioner should be reallocated as to taxable years as follows:

Year ended December 31, 1944, increase in income $41,104.58.

Year ended December 31, 1945, decrease in income $41,104.58."

In arriving at the deficiencies in income tax and excess profits taxes for the year 1944 in the respective amounts of $3,972.41 and $59,264.07, as shown by the stipulation of the parties and the decision

of the Tax Court entered pursuant thereto, as set forth in paragraph IX of these findings, no adjustment or change was made with respect to the Commissioner's determination as to the treatment of the profit derived by plaintiff from the two Oregon shipyards contracts referred to in this subparagraph.

(b) In arriving (1) at the deficiency in income tax for the year 1943 in the amount of $1,647.44, as shown in the stipulation of the parties and the decision of the Tax Court entered pursuant thereto, as set forth in paragraph IX above, and (2) at the overassessment and overpayment of excess profits tax for that taxable year of $65,905.29, the Commissioner determined and allowed as a deduction for that taxable year a net operating loss carryback from the year 1945 in the amount of $108,805.33. In the computation of said net operating loss carry-back of $108,805.33, no adjustment or change was made with respect to the Commissioner's determination as to the treatment of the profit derived by plaintiff from the two Oregon shipyards contracts referred to in subparagraph (a) of this finding.

XIII.

(a) If, in addition to the various income and expense adjustments and/or other changes referred to in paragraphs X and XI, above, the Oregon Shipyards contracts item of $41,104.38 had, as a result of the negotiations referred to in those paragraphs, been treated as income includible in plaintiff's taxable income for the year 1945, instead of the year 1944, as aforesaid, then and in that event the excess

profits tax liability of plaintiff for the taxable year 1943, computed on that basis, would have been $64,-879.99; and the overpayment for that year would have been $31,902.88 instead of $65,905.29, as aforesaid.

(b) Of the deficiency in excess profits tax for the taxable year 1944 in the amount of $59,264.07, referred to in paragraph IX above, the sum of $35,-144.25 is attributable to the $41,104.38 Oregon Shipyards contracts item adjustment referred to in paragraph XII of these findings.

XIV.

Plaintiff's Tax Court petition, filed, as stated in paragraph VII, above, on August 23, 1948, together with the file in said case, was, by the Commissioner of Internal Revenue, transmitted to the Portland, Oregon, office of the then Technical Staff of the Treasury Department of the United States on September 9, 1948. At the same time, the Commissioner transmitted to said Technical Staff certain petitions and files in regard to the following related docketed and nondocketed cases for the taxpayers and years shown:

Docketed Tax Court Cases	Years
Juanita Investment Company vs. Commissioner of Internal Revenue, Docket No. 20020	1942, 1944
Juanita R. Leggett vs. Commissioner of Internal Revenue, Docket No. 20021	1943
W. A. Rushlight and Betty Rushlight vs. Commissioner of Internal Revenue, Docket No. 20022	1944
W. A. Rushlight vs. Commissioner of Internal Revenue, Docket No. 20023	1943
Nondocketed Cases	
Raymond Rushlight	1943
Betty Rushlight	1943

In connection with all of said cases, including plaintiff's case, the taxpayers at all times between September 12, 1947 and August 24, 1951, were represented by Eric Van, a certified public accountant, and at all times between September 12, 1947 and December 2, 1950, by Carl E. Davidson, a lawyer, both of whom were admitted to practice before the Treasury Department. Meetings were held between said two representatives of plaintiff and representatives of the Technical Staff, Treasury Department, Portland, Oregon, sometimes both representatives of plaintiff being present and sometimes one only, on the following dates: November 4, 1948; January 14, 1949; May 24, 1949; August 22, 1949, and October 3, 1949; and thereafter, almost daily until about December 5, 1949. Thereafter, similar conferences were held as follows: In the year 1950, on February 10, April 3, May 9, July 5, September 7, September 30, October 13, December 1 and December 12; in the year 1951, on March 10, April 19, April 27, May 10 and June 22. Between June 22, 1951 and April 16, 1952, discussions continued between members of the Technical Staff and one of the officers of plaintiff as to items of gross income and deduction affecting all of the above cases. Commencing in June, 1953, a series of similar conferences were held with the substituted counsel for plaintiff and said other taxpayers. These conferences culminated, on or about July 21, 1953, in the settlement of all of the cases mentioned above, including plaintiff's case, which said settlement included the resulting overpayment for the year 1943,

in the sum of $65,905.29, referred to hereinabove.

In addition to the above conferences, there were a number of conferences held in November of 1950, and, by December 1, 1950, it appeared that the cases would be settled. In the Spring of 1951, tax computations were made by the Commissioner based upon the tentative adjustments reached in said negotiations which computations showed an overassessment and overpayment of plaintiff's excess profits taxes for 1943. When the plaintiff's case was finally settled in July of 1953, the only changes in adjustments from the December 1, 1950, adjustments were as follows:

(1) Plaintiff was allowed a bad debt deduction of $5,755.33 [Finding XI (b)];

(2) Plaintiff was allowed the $4,871.83 loss on the logging contract [Finding XII (f)];

(3) The matter of delinquency penalties was settled.

During all of said negotiations, the representatives of the Commissioner had before them plaintiff's tax court petition. In 1953, after all of the items of expense and income had been agreed upon, it was discovered for the first time that no refund claim on Treasury Department Form 843 had been filed by plaintiff. In said negotiations, the matter of whether or not a refund claim had been filed by plaintiff was not discussed prior to 1953.

XV.

Of the above sum of $65,905.29, overpayment by

plaintiff, there was refunded to plaintiff the amount of $35,044.35, this refund being made on November 8, 1953, by R. C. Granquist, District Director of Internal Revenue, said amount being the total of the payments made by plaintiff by way of credit on account of its 1943 excess profits tax assessment in the sums of $32,401.25 on April 9, 1952, $4,275.99 on April 23, 1952, and $593.19 on November 19, 1952, less the sum of $2,226.08. That said sum of $2,226.08 represents interest from March 15, 1944 to March 15, 1946, on the sum of $18,550.66, which was the amount of deficiency in plaintiff's 1943 excess profits tax prior to the application thereto of the carry-back loss from the year 1945.

XVI.

The Commissioner of Internal Revenue and the District Director of Internal Revenue have failed and refused to refund to plaintiff the balance of said overpayments, namely, the sum of $30,860.94.

XVII.

On January 5, 1954, plaintiff filed with the District Director of Internal Revenue for the District of Oregon for transmission to the Commissioner of Internal Revenue an amended claim for refund on Treasury Department Form 843 in the sum of $66,832.82 "or such other amount as is legally refundable". Said claim for refund referred to and incorporated by reference plaintiff's tax court petition and claimed that plaintiff was entitled to the refund of the overpayment and overassessment in plaintiff's 1943 excess profits taxes for the reasons

and upon the grounds set forth in plaintiff's tax court petition and as agreed upon by the plaintiff and the Commissioner. Thereafter and on June 1, 1954, the Commissioner, in the manner provided by law, notified plaintiff that said claim was disallowed. This action was commenced within two years of the date of said notice of disallowance.

XVIII.

On November 12, 1953, the deficiencies in income tax, excess profits tax and penalties for the years 1943 and 1944, as shown by the stipulation of the parties referred to in Finding IX above, and by the decision of the Tax Court referred to in Finding IX above, were assessed against plaintiff by the Commissioner in accordance with the provisions of §272 (b) of the Internal Revenue Code of 1939.

Based on the foregoing Findings of Fact, the court makes the following

Conclusions of Law

I.

The Court has jurisdiction of the parties and of the subject matter by virtue of Section 1346 (a)(1), Title 28, United States Code.

II.

The time within which plaintiff could file a refund claim was extended to December 31, 1949.

III.

Plaintiff's tax court petition filed on August 23, 1948, and served upon the Commissioner constituted

a sufficient and timely claim for the refund of the overassessment and overpayment in plaintiff's excess profits taxes for the year 1943 within the meaning of §§ 322 (b)(1), 3772 (a)(1) and (2), and 3771 (e) of the Internal Revenue Code of 1939.

IV.

In investigating and acting upon the matters set forth in plaintiff's tax court petition, the Commissioner waived any requirement in the Regulations of the Treasury Department that the claim be submitted on a particular form.

V.

Plaintiff had the right to amend the claim for refund contained in its tax court petition after the statute of limitations had run for the filing of refund claims, and this action was timely commenced after the disallowance of said refund claim, as amended.

VI.

The plaintiff is entitled to judgment against the defendant in the sum of $30,860.94 together with interest thereon at the rate of 6% per annum from August 23, 1948. Plaintiff is also entitled to judgment against the defendant for interest at the rate of 6% per annum on the amounts which were refunded to plaintiff (by way of credit) from the date said amounts were paid by plaintiff to the Director and/or Collector of Internal Revenue to November 12, 1953, the date that said credits were allowed.

Dated: December 21, 1956.

/s/ CHASE A. CLARK,
Judge

Acknowledgment of Service attached.

[Endorsed]: Filed December 26, 1956.

In the United States District Court for the District of Oregon

Civil No. 7582

A. G. RUSHLIGHT & CO., an Oregon corporation, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

JUDGMENT

The above entitled action came on for trial before the court without a jury, the plaintiff appearing by Denton G. Burdick, Jr., one of its attorneys, and the defendant appearing by Allen Bowden, attorney, Department of Justice, and Edward J. Georgeff, Assistant United States Attorney for the District of Oregon. The court, having considered the pre-trial order and the agreed facts therein, the testimony and exhibits introduced at the trial, and the briefs of counsel, and having filed its memorandum opinion, its findings of fact and conclusions of law, and

The court being fully advised in the premises,

Now, Therefore, It Is Hereby Ordered and Adjudged that plaintiff have and recover judgment

against the defendant in the sum of $30,860.94, together with interest thereon at the rate of six (6) per cent per annum from August 23, 1948; for the further sum of $3,528.26, together with plaintiff's costs herein taxed at $15.00.

Dated: December 21, 1956.

/s/ CHASE A. CLARK,
Judge

Acknowledgment of Service attached.

[Endorsed]: Filed December 26, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: A. G. Rushlight & Co., an Oregon corporation, Plaintiff, and Denton G. Burdick, Jr., attorney for Plaintiff:

Notice is hereby given that the United States of America, defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this action on December 21, 1956, in favor of plaintiff and against defendant.

Dated this 18th day of January, 1957, at Portland, Oregon.

C. E. LUCKEY,
United States Attorney for the District of Oregon

/s/ EDWARD J. GEORGEFF,
Assistant United States Attorney

[Endorsed]: Filed January 18, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer; Pre-trial order; Opinion; Notice of appeal; Order extending time to docket appeal; Findings of fact and conclusions of law; Judgment; Notice of appeal; Designation of contents of record on appeal and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7582, in which The United States of America is the appellant and defendant and A. G. Rushlight & Co., an Oregon corporation is the appellee and plaintiff; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 21st day of January, 1957.

[Seal] R. DE MOTT,
Clerk
/s/ By THORA LUND,
Deputy

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

This matter came on for hearing before the Honorable Chase A. Clark, sitting without a jury, at Portland, Oregon, on February 8, 1956, at 10 o'clock a.m. [1*]

* * * * *

A. N. WILLIAMS

called as a witness by the Defendant, after being first duly sworn, testifies as follows:

Direct Examination

* * * * *

Q. (By Mr. Bowden): Mr. Williams, what was your occupation in the years 1948 to 1953?

A. I was employed in an organization that was then known as the [6] Bureau of Internal Revenue, and I was in charge of the Portland office of the then technical staff, which is now known as the appellate division.

Q. Mr. Williams, will you briefly describe to the Court the functions of your office at that time?

A. At that time the functions of our office were very much as they are today, some difference in details, but not many. We considered two types of cases, Income tax, State tax and Gift tax cases.

One type consisted of the cases in which statutory notices of deficiency had not been issued and the

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* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of A. N. Williams.)

cases therefore had not been appealed to the Tax Court of the United States. The second type was the cases in which statutory notices had been issued and in which petitions had been appealed to the Tax Court and which were before us in an effort to effect a settlement of the case without actual trial before the Court.

Q. So it is your testimony that there were basically two; types of cases?

A. Yes, sir.

Q. One, pre-deficiency notice cases and two, post-deficiency notice cases,—cases that had been docketed in the tax court?

A. That is correct.

Q. I wonder if you would very briefly give a sequence of events that would occur prior to the issuance of a so-called 90 day letter? [7]

A. Of course, all such conferences originated in the office of the Internal Revenue Agent in charge. Now, after an examination had been made and the examiner had made a report comprehending his findings of fact and conclusions with respect to the case, it was reviewed in that office and if it was approved,—if his findings, his report was approved, the taxpayer was given an opportunity for conferences in that office. In many cases numerous conferences were necessary before the case was disposed of. In any event, if the taxpayer and the conferee agreed that was, ordinarily, the end of the case. If they did not agree the taxpayer was given an opportunity to have his case referred to

(Testimony of A. N. Williams.)

the technical staff, the organization with which I was associated. If it was so referred we held conferences and attempted to reach a settlement or agreement with the taxpayer and if we did not reach such an agreement we returned the case to the office of the agent in charge in order that a statutory notice might be issued on the basis of our findings. However, if the taxpayer, while the case was under consideration in this pre-statutory notice status did not ask for the case to be referred to us, then the Agent in charge issued a statutory notice on the basis of his own findings without any reference to the technical staff.

Q. Mr. Williams, would you briefly describe the conditions of a 90 day letter? [8]

A. I am sorry, I didn't hear that.

Q. Will you briefly describe a 90 day letter, in other words, will you briefly describe the purpose of a 90 day letter?

A. A 90 day letter is more properly referred to as a statutory notice of deficiency. A statutory notice of deficiency itself is ordinarily a one page document in which the taxpayer is advised that there has been a determination that there is a deficiency due in the amount of so many dollars. Attached to that document, however, is a statement of the basis upon which this determination is made. Ordinarily it would start,—practically in all cases, at any rate, it would start with the income shown by the return, showing the adjustments of that income, explain the adjustments and end with the in-

(Testimony of A. N. Williams.)

come as determined by the writer of the letter, or by the auditor who actually prepared the statement. In cases which involve State tax or gift tax or similar schedules, they would be attached. In cases that involved excess profit tax there would be other schedules showing computations of invested capital, credits computed on the basis of invested capital meeting the effect of the law involved. Then, after those adjustments of income and invested capital and the credits have been made there would be other schedules showing the computation of tax liability, ending with the deficiency shown by the face of the return.

Q. After the issuance of the statutory notice of deficiency [9] what right of appeal did the taxpayer have?

A. He had the right to petition the Tax Court of the United States.

Q. How long did he have?

A. Ninety days.

Q. After a case had been docketed in the tax court would your office have occasion to reconsider that case?

A. Yes. When a case was docketed with the Tax Court or a petition filed with the Tax Court, a copy of that would be in Washington. A copy of that petition would be referred to the National office of the Chief Counsel whose office is in Washington. I don't know particularly what happened at that time, I suppose it was largely for record purposes. At any rate, a copy of the petition was forwarded

(Testimony of A. N. Williams.)

to our office addressed to my superior for record making purposes. It was held there until it became associated with the administrative file, and the administrative file would be forwarded to us. I am speaking of 1948 now,—forwarded to us by the office of Internal Revenue Agent in charge whose office was in Seattle. When the administrative file was received a record was made of both the administrative file and the petition which we call the legal file, from Washington, and the two of them were brought together by the proper official or person in our office, the record clerk. Then they were transmitted directly to the office,—to the Portland [10] representative of the Chief Counsel, or the Counsel in charge of the Portland office for the purpose of answering the petition. After the petition had been answered and pleadings were complete, the administrative file was then returned to us, when I say us, I mean to me for assignment to someone under my direction who would consider the case from the standpoint of attempting to arrive at a mutually satisfactory basis of settlement with the taxpayer. At that point, after the case was assigned to this person the taxpayer would be contacted, conferences arranged and they would go on from there.

Q. Would the matter have been referred to you if you had considered the case prior to the issuance of the 90 day or the statutory notice of disallowance,—after the notice of deficiency was given?

A. Would you repeat that question?

(Testimony of A. N. Williams.)

Q. If your office had occasion to consider a particular case prior to the issuance of the statutory notice of deficiency would that case then have been referred to you after the petition was filed with the Tax Court?

A. Not automatically.

Q. Will you briefly explain the circumstances under which it would have been referred to you?

A. If the taxpayer requested us to consider it it would then be referred to us and we would again consider the case.

Q. At this stage of the case, in other words, one that was [11] referred to you after the filing of the petition in the Tax Court what was your principal function in considering that case?

A. Our function was to—our ultimate function was to reach an agreement, if possible, with the taxpayer with respect to all disputed points. Preliminary to that it was necessary for us to examine the files as they pertained to the income adjustments and all other adjustments and test those adjustments,—that is the adjustments of the taxpayer or petitioner against the records that we had or the record as supplemented by additional records of evidence that might be submitted. In other words, to determine what income adjustments were to be made if any on the basis of the petition as filed.

Q. Did there come a time during the course of your duties between the years 1948 and 1953 that you had occasion to consider a case in Tax Court entitled A. G. Rushlight Co. vs. Commissioner?

(Testimony of A. N. Williams.)

A. Yes, sir.

Q. Will you relate to the Court briefly the circumstances under which that case was referred to you?

A. In accordance with the procedure which I have outlined relating to the handling of cases after the issuance of statutory notices, the administrative file on the case of A. G. Rushlight & Co. was received by our office [12] on September 9, 1948. Also in accordance with that procedure the legal file was received on September 14, 1948. The two files were associated in the manner that I have outlined and they were given to the counsel in charge, turned over to him in order that an answer might be prepared to the petition,—the taxpayer's petition.

Q. After the answer had been prepared and filed by legal counsel was the matter then referred back to your office?

A. Yes, automatically it came to us.

Q. Now, so as not to confuse the matter, what other cases in addition to this particular case was referred to you at the same time?

A. There were the individual cases of W. A. and Betty Rushlight,—I should say the individual case,—the case of W. A. and Betty Rushlight, joint returns having been filed for certain years,—the individual case of W. A. Rushlight who, for the particular year involved, filed a separate return. The case of the Juanita Investment Company, and the case of Juanita Leggett, those constituted the

(Testimony of A. N. Williams.)

five cases in which petitions had been filed with the Tax Court, all of which were referred to us at the same time. In addition to that there were certain related non-docketed cases.

Q. Would you say, Mr. Williams, that these cases were related [13] in the sense that certain income and expense items as to one would necessarily affect the others?

A. Yes, they were. That was particularly true of the three cases that I mentioned first, namely: A. G. Rushlight Co., W. A. and Betty Rushlight and W. A. Rushlight. It was true in a lesser degree with respect to the relationship of the two cases, W. A. and Betty Rushlight, W. A. Rushlight on one hand and the Juanita Investment Company on the other.

Q. Now, Mr. Williams, starting with the period of September 1948 when these cases were referred to your office for consideration, could you briefly trace the sequence of events which occurred during the period from 1948 to 1943?

A. 1943 you say.

Q. Pardon me, 1948 to 1953? A. Yes.

Q. That does not have to be in detail Mr. Williams, at this point.

A. I already stated that the cases were referred to us after the pleadings were completed and our records show that they were received for the purpose of conducting settlement negotiations on October 14th, 1948. At that time I did something that I have since regretted to a certain extent, I assigned

(Testimony of A. N. Williams.)

the cases to myself for consideration. A conference was arranged for,—I can't give you the exact date [14] unless I take time to examine my file——

Q. ——The year?

A. I think it was in November.

Q. The year?

A. 1948, but that was only a very preliminary discussion. There was a further conference very early in 1949. There were, I believe, three conferences during the Spring and Summer of 1949. About, I should say not later than the first of September and probably before that, in 1949, we were advised that the Tax Court would be here in Portland beginning on October 24, 1949, and from that time and for a period of several weeks there were numerous discussions had with respect to what should be done in these cases. Mr. Pigg and I,—Mr. Pigg being the Counsel for the Government, and I conferred between ourselves, and with the Petitioner's attorney of record as to the handling of the cases at that time, with the result that no agreement with respect to any settlement was reached before the call of the Calendar and when the cases were called a motion was made on behalf of the Petitioner that the case be continued and that motion was not opposed by the Government. Thereafter, during the year 1950 another series of conferences were held which were not productive of any settlement resulting, and the case, later in the summer or early fall was again placed on the calendar of the Tax Court for hearing, trials of

(Testimony of A. N. Williams.)

which were scheduled to begin at Portland [15] October 23, 1950. For a period of several weeks before October 23, there were frequent discussions between myself and counsel for petitioners for the purpose of resolving as many of the issues as we could and considerable progress, as to a meeting of the minds, was made during those discussions, but a definite basis of settlement was not reached. When the case was called on the hearing date of the calendar it was again continued with the thought being that negotiations for settlement had progressed to such a point that it was reasonable to anticipate that settlement would be reached within a reasonable period of time. Immediately after the Tax Court had completed hearings in other cases I gave as much attention to the case as time permitted and there were a number of conferences held during the latter part of November and they culminated in a conference that was held on December 1, 1950, and at that time the negotiations had progressed to the point that it appeared that we were really in a settlement area. There were some undecided matters that it was necessary for me to give some additional thought to, but on December 1, 1950, it definitely appeared that we were within settlement area. After that conference and for the remainder of the year,—I didn't keep a time-sheet on this but I think I gave practically my entire time to the matter of this case, and that situation continued during those weeks, it [16] seemed that the prospects for settle-

(Testimony of A. N. Williams.)

ment were improved, if anything, over what they had been on December 1. Early in 1951 I was advised that the settlement proposal—I was advised that the suggestion, I could say that rather that proposal, the suggestion that had been made leading toward a settlement, in the conference of December 1, 1950 and prior thereto were not acceptable to Mr. Rushlight, and from that time on for a period of approximately three months very little was done on the case, and I believe it was in April 1951 that conferences were again resumed, and there was a series of three or four conferences, I can't tell exactly without looking at my record. Between that date, which was about the middle of April,—between that date and the latter part of June,—by the first of July it became apparent that the parties were not in an area of agreement and for a period of several months my work on the case was sporatic, and Mr. Robert Horning, who was employed by Mr. Rushlight in an accounting capacity worked with me however, at times during the Summer and Fall and I think until early in 1952 in preparing income statements, schedules of income on which we could agree. Primarily our intention was to have figures so that each one of us could know what the other was talking about in the event either or both of us should have occasion to give the cases further consideration at some later date. [17] That work was completed in the early part of 1952, and from that time there was nothing done on the cases until they were set down for trial

(Testimony of A. N. Williams.)

before the Tax Court for the third time for a hearing beginning in Portland, I believe that was in July 1953. Approximately one month before the 1953 hearings Mr. Girigley called me and said that he had been retained by Mr. Rushlight and asked if conferences could be arranged for the purpose of exploring the possibilities of settlement without trial, so as a result of that telephone call a series of conferences followed in which Mr. Girigley and Burdick participated and represented Mr. Rushlight and his company and Mr. Pigg of the chief counsel's office in Portland and Mr. Durkins of the chief counsel's office in Seattle, whose post of duties was in Seattle participated together with myself.

Q. What was the ultimate result of these conferences in the middle of 1953?

A. The ultimate result was that a basis of settlement was agreed upon, income adjustments were agreed upon and these adjustments were turned over to our auditor,—the auditing staff at our office. Computation of the taxes was made and those figures were agreed upon by representatives of the taxpayer.

Q. And the case was closed in your office?

A. Stipulations with respect to the tax liability with [18] respect to which the tax court had jurisdiction were prepared on the basis of those audit figures and were filed with the Tax Court I believe August 6, 1953, I believe that is the date it was.

Q. Now with respect to the item of excess profit

(Testimony of A. N. Williams.)

taxes for the year ending December 31, 1943, with which the Tax Court said that it had no jurisdiction, what steps were taken by you to settle that liability?

A. In computing the tax liability with respect to which the Tax Court did have jurisdiction it was found,—let me rephrase that,—in computing the tax liabilities with respect to the taxes which were actually at issue before the Court, computations were also made by our audit section showing the excess profit tax liability for the year 1943.

Q. As a result of form 870 executed——

A. Following up and giving effect to that computation, we prepared form 870 which is a form that the appellate division uses in cases that it considers as in the pre 90 day status as distinct from the docketed status which shows the over assessment or the deficiency as the case may be.

Mr. Bowden: Your Honor, we have attached seven exhibits to the pretrial Order, now, may I show Mr. Williams a copy of exhibit numbered 3 so that he may refresh his recollection.

The Court: I notice these exhibits, and a stipulation that they may be identified, I don't know [19] but I think maybe that these exhibits should all be offered and admitted.

Mr. Bowden: I would like to offer these exhibits, your Honor.

The Court: All of the exhibits shown in the pretrial order may be shown as offered and admitted.

(Testimony of A. N. Williams.)

Q. That particular document was prepared in your office, is that correct, Mr. Williams?

A. Yes, sir, that's correct.

Q. And that document was sent to the Counsel for the taxpayer?

A. Yes, it was, it was either sent to him by mail or handed to him in my office, I am not sure about that.

Q. Do you recall at the time that particular document was prepared and delivered to the taxpayer, or counsel for the taxpayer, what his reaction was to the section 322 limitation as shown in the upper right hand corner?

A. As I recall there was some but not great hesitancy with respect to signing the document,—the agreement form with that statement up there which reads "Accepted as to amount of overpayment refundable subject to provisions of Section 322, Internal Revenue Code", signed A. N. Williams, Associate Chief Appellate Division. There was some hesitancy on the part of counsel for the taxpayer but no great hesitancy in signing the agreement form.

Q. Can you recall anything that was said on those occasions [20] Mr. Williams, either by you or by counsel for the taxpayer?

A. No, I can't recall anything in particular, there was some discussion but as I say, it could be summed up in what I just said,—they regretted naturally that we insisted that this qualification be added to the agreement form.

(Testimony of A. N. Williams.)

Q. Was there any discussion at that time regarding a claim, the filing of a claim for refund?

A. At the time of signing this,—I recall very distinctly the day that this agreement was signed. At that particular moment I do not recall that there was any discussion with respect to this claim for refund.

Q. Anything on or about that time which would bear on that?

A. When the matter was discovered, that this overassessment was apparently barred, a careful search was made of the file for a claim——

Q. ——of your files, Mr. Williams?

A. Yes.

Q. Go ahead.

A. And an examination was made of the statutory notice and it was brought to light at that time that the statutory notice which had been issued by the then Revenue Agent in charge in Seattle, Mr. Stockton, had a paragraph in it which cautioned the taxpayer with respect to the advisability of filing a claim for refund. [21]

Q. Did counsel for Taxpayer request you to search your files for claim for refund in this particular instance?

A. I don't believe that they made specific requests. We searched our files independently of any request that might have been made of us.

Q. Mr. Williams, with respect to the other docket cases which you had under consideration, after they were ultimately settled, income and ex-

(Testimony of A. N. Williams.)

penses determined did they have proper, or did it appear that in all of those cases proper claims for refund had been filed?

A. May I just answer it this way,—there were in this group of cases a number of claims for refund, I can't tell without examining our files how many, but there were a number, and I can recall no controversy or discussion with respect to any other missing claims. I don't think that there was any discussion.

Q. Now, may I go back a few moments,—During the course of your discussion of this case and other cases would you say particularly what your attention was directed to. In other words, was it directed to the income and expense solely or did it go further and relate to other items?

A. My attention was directed to the items of income, deductions, expenses, items of invested capital and there are other items that must be taken into consideration in figuring tax, in these particular years for this taxpayer at any rate. I am thinking of the credits for excess profit tax purposes [22] which followed automatically and were given consideration by our auditors, so, in answer to your question, we considered income, deductions, expense, invested capital items and in this particular case the question of whether the certain penalties had been properly or improperly imposed.

Q. Did you ever during the discussions refer to

(Testimony of A. N. Williams.)

amounts which may or may not have been refundable to the taxpayer?

A. Are you asking with respect to the period, we will say, prior to June 1953?

Q. Yes.

A. No, there was no discussion of the sums refundable.

Q. At any time did you ever refer these cases to the audit section for computation of any amounts which may have been refundable prior to 1953?

A. Not on the basis of agreed income determination. There were certain tentative computations made but they were not on the basis income adjustment which had been proposed and accepted as for settlement purposes or anything of that nature, in other words, I spoke a moment ago of the facts, or the result of the conference on December 1, 1950, and the preceding conferences where it appeared that we were within an agreement area. Now, sometime in the early part of 1951 computations of tax were made on that and a number of other basis but they were not on the basis of agreed income adjustments.

Q. At any time during the discussions prior to 1953 did the taxpayer or his representative ever discuss the matter of claims for refund in this case?

A. I am trying to review the steps in this period of about three and a half years, in fact, almost four years that these cases were before me and I can't recall that the matter of refunds, as such,

(Testimony of A. N. Williams.)

were ever discussed until immediately before the closing of the case in August 1953, immediately before the filing of the petition with the Tax Court in August 1953, when I say immediately, I mean a matter of a few weeks before that.

Q. I wonder if you would refer to exhibit numbered one. Page two of the statement, will you kindly read to the Court the first paragraph and then explain to the Court the reason for the insertion of that paragraph in that letter?

A. The paragraph reads as follows: "The overassessment shown herein will be made the subject of a certificate of overassessment which will reach you in due course through the office of the collector of internal revenue for your district, and will be applied by that official in accordance with Section 322 (a) of the Internal Revenue Code, provided that you fully protect yourself against the running of the Statute of Limitations with respect to the apparent overassessment referred to in this letter, by filing with the collector of internal revenue for your district, a claim [24] for refund on Form 843, a copy of which is enclosed, the basis of which may be as set forth herein." Now, what was the rest of your question?

Q. What was the purpose of inserting that paragraph in that letter? Also the purpose of enclosing form 843 with that letter?

A. Of course, I didn't issue this letter but I think I can answer your question. Page one of this statement sets forth the tax liabilities, that

(Testimony of A. N. Williams.)

means the tax liabilities determined by the office of the Internal Revenue Agent, the amount previously assessed and the deficiencies and penalties asserted. It also, the same tabulation, shows an overassessment of excess profit tax for the year 1943 in the amount of $12,853.92. Now, in issuing this statutory notice the man who prepared it was cognizant of the fact, apparently, that if a petition was filed with the Tax Court, the Tax Court would not have jurisdiction with respect to the overassessment of the $12,853.92, therefore, for the purpose of putting the taxpayer on notice in order that he might or it might protect its interest, the paragraph that I have just read was inserted in the statutory notice and a copy of the form which was recommended to be used, was enclosed, form 843.

* * * * * [25]

Cross Examination

Q. (By Mr. Burdick): Regarding the procedure that you have described Mr. Williams, as I understand it you were the head of technical staff here in Portland, isn't that right,—up until they changed it to the appellate division?

A. No, that isn't correct. At that time the appellate function of the then Bureau of Internal Revenue in this region, this section of the country was in the hands of the Northwestern Division Technical Staff, and we had two offices, one in Seattle and one in Portland. The territory embraced was Alaska, Washington and Oregon, Idaho and Montana. Cases arising outside of Oregon [26]

(Testimony of A. N. Williams.)

or Washington would normally come to either Seattle or Portland, depending on the location of the taxpayer or their pleasure. Now, as to the Seattle office, by immediate superior was in Seattle and was the head of the division and I was in charge, directly responsible to him, of the Portland office. I believe my title at that time was Technical Adviser in Charge, or something like that.

Q. Did that situation continue up through all of the period up through 1953 except for the change in name?

A. It did not. There was an extensive reorganization of the entire Revenue Service in 1952, and it became effective as to this section of the country on October 30, 1952, I believe, and at that time, not immediately, but shortly after that I was placed directly in charge of the Portland office and given authority to settle cases on my own responsibility. I was still responsible to Mr. Hilacker, in that he received a different title and there was another adviser in the Seattle office that was also responsible to him,—this adviser that I speak of and myself occupied the same respective positions in our cities.

Q. From October 30, 1952 when this reorganization went into effect you were given authority to settle cases under that procedure were you?

A. I was,—not immediately but very shortly, it was a matter of delegation and the delegation could not become effective for a period of some weeks or perhaps months, [27] but pursuant to the

(Testimony of A. N. Williams.)

general plan of the reorganization I was given that authority.

Q. Then, in other words, when Mr. Gerany and I settled this case with you in 1953 at that time you had been delegated authority to settle cases?

A. I had settlement authority at that time.

Q. And that authority stems from the Commissioner of Internal Revenue does it not?

A. That's right. It was a matter of delegation, two different steps I believe.

Q. Anyway, when you settled the cases it was because you were the representative, legally in charge of this office for the Commissioner of Internal Revenue?

A. To that extent, yes, that's right. Within the limits only of the functions of what became known as the appellate division.

Q. Prior to that time you had to submit settlement to your superior, Mr. Hilacker, didn't you?

A. That's right.

Q. But you are the person who negotiated with the taxpayer on behalf of the technical staff in this area prior to October of '52?

A. Yes, on behalf of the technical staff, but that should be qualified by stating that in as much as this was a docketed case, the technical staff or the appellate division counsel also participated in negotiations, at least to a limited [28] extent, I mean by that, they did not participate in all conferences by any manner or means, but they did participate

(Testimony of A. N. Williams.)

in some of them and Mr. Pigg was kept advised of our progress.

Q. Between you and the members of the counsel staff the primary responsibility was on you wasn't it? You did make the decisions of settlement after consulting with them?

A. Will you ask that question again?

Q. Yes, as between you and the attorney in the counsel's office that you consulted with, was that Mr. Pigg,—who had the primary responsibility as between the two of you? Who had that responsibility to decide as to whether the matter was settled?

A. As I understand your question there was no primary responsibility. It was my responsibility,—as a practical matter, the way it worked out in this case, it was my responsibility to negotiate with the taxpayer's representative and after a basis of settlement had been reached, had been proposed I will say,—and was determined to be acceptable to me, one that I would recommend to my superior, to my immediate superior, who was Mr. Hilacker, after the basis of settlement had been determined to be one that I would recommend as being acceptable to me then I conferred with Mr. Pigg to see if it was acceptable to him. In other words, we made joint recommendation, [29] our recommendations were joint as between Mr. Pigg and myself.

Q. Now, when this case was finally settled it meant that the settlement was agreeable to both you and Mr. Pigg? A. That's right.

(Testimony of A. N. Williams.)

Q. Your office was the only office who had authority at that time to settle a docketed case, wasn't it Mr. Williams?

A. We did not have authority and ever had autority to settle a docketed case without concurrence of Mr. Pigg's office.

Q. Then, between your office and Mr. Pigg's office, there wasn't any other office that had anything to do with settling docketed cases?

A. No, there was not.

Q. On these discussions that you had that you described to the Court here extending over this period, did you keep Mr. Pigg's office advised of all those discussions from time to time, as to their progress?

Q. We made no attempt to advise Mr. Pigg or anyone in his office with respect to the day by day, and sometimes hour by hour development, we did not do that, but on the other hand when something came up, when it appeared that a step that was of real importance had been taken or a real gain had been made in our ultimate objective of reaching an agreement, either to agree or disagree, when a point such as that was reached I always conferred with [30] Mr. Pigg and advised him of the progress or lack of progress which had been made.

Q. Now, on these conferences that are listed in the pretrial Order, were you present Mr. Williams, at all of those that are listed in the pretrial Order?

A. Yes, there is not a conference listed in the

(Testimony of A. N. Williams.)

pretrial Order that I did not attend. I don't think there was ever a conference held in this case that I wasn't in on.

Q. Then you were present at all of the negotiations mentioned in the pretrial Order,—you were there at every conference?

A. Yes, I think so.

Q. You had various people with you at times but you were there yourself at each one of them?

A. That's correct.

Q. I think you said that you referred this case to yourself when it was referred to your office, I think the word you used was that you assigned it to yourself? A. I did.

Q. Now, referring to your testimony in regard to this meeting that you mentioned on December 1, 1950, I think you said that at that time you felt that your negotiations were in what you termed as in a settlement area? A. That's correct.

Q. At that time had you given consideration to all of the issues that are set forth in the pretrial Order,—Just a minute, I think I better rephrase that question. [31] You are familiar with the items of income and adjustments that are set forth in detail in paragraph 11 of the pretrial Order?

A. May I have a copy of the pretrial Order. You said paragraph 11.

Q. Paragraph 11, page 6, that paragraph ends on page 14.

A. Yes, I am familiar with those adjustments.

Q. Were those adjustments considered by you,

(Testimony of A. N. Williams.)

those mentioned there,—were they considered by you in connection with this area of settlement that you thought you reached in 1950, December 1, 1950? A. Yes, they were.

Q. All right, now, I think you said that Mr. Gerany and I represented the Plaintiff here during the time, starting in 1953, isn't that right?

A. The first contact with me was, I think, in June, around June 22 or 23, 1953.

Q. Now, you are familiar with how this case was finally settled as is shown in the pretrial Order are you not. I mean, how it was finally settled as to all of these issues shown in that paragraph?

A. I don't attempt to carry them all in my mind, if that is what you mean.

Q. Can you tell what changes there are in the way these issues were finally settled as shown by the Pretrial Order and the way they were settled at the time you thought you [32] were in an area of agreement, December 1, 1950. What changes were made as a result of negotiations.

A. You have spoken of this agreement, the result of this conference of December 1, 1950 as settlement reached, that was not a settlement, there were certain adjustments that had been discussed previously in numerous conferences, certain income adjustments. As I recall what happened in the conference of December 1, 1950, the discussion pertained very largely to the matter of penalty, and it is to be remembered that the corporation case which we now have before us and the individual

(Testimony of A. N. Williams.)

cases which involve the partnership and had very complicated features, were all under consideration. Now, these income adjustments as to the corporation had been discussed in previous conferences at great length and there was very little discussion of those adjustments in the conference of December 1, 1950 as it pertained to the corporation income. There was a large amount of discussion as to penalties. Now then, in the final settlement that was reached referring to the corporation, there was a reduction income for the year 1943 in the amount of $5,755.33 which at the time of the December 1, 1950 conference it had not been anticipated would be made, that is for 1943. In computing the net operating loss carry-back from the year 1945 to the year 1943 there was an additional deduction of income allowed of $4,871.83. [33]

Q. That item you just mentioned Mr. Williams, $4,871.83, that is the item shown in connection with the logging contract with the Juanita Investment Company, isn't that right?

A. That is correct.

Q. In other words, the only changes that were made in what you call the anticipated settlement, or possible settlement were these two items, otherwise it went through the way it was in 1950?

A. No, it did not. Because in the negotiations that were conducted up to December 1, 1950 and in that conference I had not reached a decision in my own mind as to whether or not delinquency penalties should be sustained in the case of the cor-

(Testimony of A. N. Williams.)

poration by reason of failure to file a timely excess profit tax return. I don't have the figures before me at the moment but I believe there was a conditional concession on final settlement on that, before I testify as to that I would like to examine it further.

Q. In other words, there were three things that were different you think, between the way it was finally settled and the figures in 1950, the two you mentioned and the matter of penalties, is that right?

A. I think that is correct as far as the corporation is concerned.

Q. As far as the corporation is concerned?

A. Yes, that is correct. [34]

Q. Then I think you said that you made some computations based on the December 1, 1950, figures as to what the taxes would be?

A. I never made any computations.

Q. Well, that someone made tentative computations on the amount of the taxes, that was my recollection of your testimony.

A. I am sorry, I didn't quite understand that last question.

Q. I may have misunderstood your testimony on direct examination but I thought you said something to the effect that the only time you figured how much tax was involved here in these adjustments of income and expense was based on these 1950 figures, and that you did make a computation at sometime or another?

(Testimony of A. N. Williams.)

A. I never made any.

Q. Did you have any made?

A. Our audit section made the computation.

Q. Did you see those computations?

A. I saw the result of them.

Q. You saw the result of them?

A. Yes, but I am not prepared to testify that those computations followed or did not follow exactly the income adjustments that I had in mind and I think that Mr. Rushlight's then representatives had in mind.

Q. Were those computations based generally on the 1950 figures? [35]

A. Generally they were, yes, but those were not made until—I should say that was only one group of computations that were made and none of those were made until well into the year 1951, the spring of the year 1951.

Q. And those computations if they are based on this 1950 area of agreement they would show a substantial overassessment of the 1943 excess profit tax wouldn't they?

A. Yes, they would show an overassessment in the 1943 excess profit tax.

Q. I think you testified in direct examination that you gave your entire time to this case during December 1950, when you say this case you meant these related cases, did you?

A. That is correct all these cases.

Q. I think you said that you treated all of these cases mentioned in the pretrial Order,—that you treated them all together?

(Testimony of A. N. Williams.)

A. When you say all the cases do you refer to the corporation and A. G. and Betty Rushlight——

Q. ——You mean Raymond Rushlight don't you?

A. No, not for this purpose.

Q. Maybe we better start over again.

A. What was this question?

Q. Did you treat all these Rushlight cases that are mentioned in the pretrial Order together. Did you treat them all together?

A. It cannot be said that we treated the Juanita Investment [36] Company and Juanita Leggett as a part of this group. The issues involved in those cases were almost entirely distinct from the other cases.

Q. Except for those two cases they were treated together,—that is, the Juanita Investment Company and Juanita Leggett matters?

A. Yes, these conference dates mentioned in the pretrial Order, it would be impossible to say that a conference was held on such and such a date with respect to the corporation because the probabilities were that other cases were discussed at the same conference, or issues involved in the other cases.

Q. When did you first discover that no refund claim on form 843 had been filed by the Plaintiff in this case?

A. I have no record of the exact date but it was at the time we were working over the figures for

(Testimony of A. N. Williams.)
the purpose of determining what the stipulated deficiencies would be on the overassessment.

Q. That would be after Mr. Gerany and I were in the case would it?

A. Oh, yes, possibly a week before the stipulation was filed with the Tax Court.

Q. That was in 1953 was it?

A. That is correct.

Q. Was that after Mr. Gerany and I had agreed with you on [37] all the items of expense and income? A. That's right.

Q. So we had agreed on all items of income and expense before it was discovered that there wasn't any refund claim? A. That is correct.

Q. You had refund claims for Betty Rushlight and Raymond at that time, didn't you?

A. I have no recollection at present what refund claims we had and I can't tell from these records here, but I assume those were the ones we did have. We did have refund claims?

Q. You had a number of them, didn't you, in connection with these cases?

A. We did, yes.

Q. Now, these other cases,—just strike that,—Mr. Williams did you handle these cases just like you would have handled them if there had been refund claims filed by the plaintiff here?

A. That question involves so many possible differences of fact that I cannot answer it.

Q. Did you handle the cases any different up to the time that you discovered that there wasn't

(Testimony of A. N. Williams.)

any refund claim than you would have done if there had been?

A. Again I say I cannot answer that question because if a refund claim had been filed it is entirely possible that [38] an allegation of the facts would have been made in that claim and evidence would have been submitted or a separate examination by a revenue agent would have been made at the time which would have divulged information that would change the entire aspect of the case. I can't answer that.

Q. So you did have refund claims by Betty and Raymond Rushlight and by other taxpayers here, didn't you? A. We did.

Q. Did you make any special investigation by reason of the fact that you had their refund claim before you?

A. I believe, as I recall now, that it would have been impossible for us to consider those refund claims to a conclusion without a supplemental investigation being made in the field by a revenue agent or someone delegated by the revenue agent in charge, such investigation being made after the cases were referred to us. I think; it would have been impossible, before I make a categorical statement to that effect I would have to look up the record to refresh my memory,—records that I do not have here.

Q. Now, Mr. Williams, in those negotiations that you had in 1951, '52 and '53, I think you testified

(Testimony of A. N. Williams.)

that you never referred to any amounts that were refundable in the form of tax, is that right?

A. That's right. [39]

Q. But if you followed through on the adjustments that you did discuss, the income and expense deductions,—if you followed through and computed it then if there was a deficiency or refund that would follow as a matter of course based on the tax levy?

A. In any event it would depend upon,—the overassessment or deficiency would depend on the state of facts relative to the statute of limitations.

Q. Then if you computed taxes based on these figures you are using it would show an overassessment, an overpayment or a deficiency then as a matter of course?

A. Yes, it would show additional tax due, overpayment due the taxpayer but of course, whether the additional tax was assessable and whether or not the overpayment was refundable would be determined on the facts so far as the statute was concerned.

Q. But you were not concerned with that?

A. No.

* * * * *

Q. Mr. Williams, when you were handling these Rushlight cases, these negotiations that you mentioned here, when they were being carried on, did you assume that [40] the claim had been filed as suggested in the statutory notice, the section that you read to the Court here?

(Testimony of A. N. Williams.)

A. The question of whether a claim had been filed or not never arose in my mind because we were devoting ourselves to the determination of tax liability.

Q. Now, will you explain it again how you would have handled it differently if a claim had been filed on form 843 referring to the 90 day letter?

A. I don't see how I can answer that question for the simple reason that if a claim had been filed it is not improbable at all that the entire picture of the cases would have changed. What I mean by that is this, that the claim might have been investigated in the Agent's office before being referred to us. The claim might have never come to us and if it came to us whether it was investigated or not, and the question that it would in all probabilities have carried a separate statement of facts based upon the evidence contained in the claim or the development of consideration,—the development as a result of a consideration of the statements made in the claim it is probable that the cases would have assumed entirely different aspects.

Q. All right, assuming that a claim had been filed as was pointed out in the statutory notice, and I quote: "namely, the basis of which may be as set forth herein" would that claim have been investigated? [41]

A. If a claim had been filed it would have been filed in the agent's office or the Director's office. In the office of the Collector before the reorganization

(Testimony of A. N. Williams.)

of the Bureau and the office of the Director if after that time. What they would have done with that claim I don't know. I can speculate as to what they might have done with the claim.

Q. Now, in the case of the other taxpayers here who didn't have docketed cases, those claims were referred to you?

A. Yes, they were, they came to us with the file.

Q. Did you examine these other claims for refund during the course of your negotiations?

A. No, I don't think I did examine them.

Q. Then we can say that you didn't know what claims for refund were there and what claims were not, is that right?

A. Not until we determined tax liability.

Q. In other words, it wasn't until after Mr. Gerany and I on behalf of the plaintiff here and the other payers and you agreed on the items of the expense and income, it wasn't until after that that we even inquired as to the matter of the claim, is that right?

A. Ask that question again will you?

Q. It wasn't until after we came to a settlement with you as to items of income and expense that we went into the matter of whether claims had been filed or not, is that right?

A. In our conferences we didn't discuss the matter of [42] whether or not claims had been filed. The situation with respect to individuals was somewhat different in any event from the case of the corporation for these reasons,—these refunds that

(Testimony of A. N. Williams.)

were claimed in the case of the individuals were attributable to adjustments increasing tax liability in the case of Mr. Rushlight, namely as a result of the Bureau holding in the statutory notice of deficiency issued in his case that Mr. Rushlight and his brother Raymond should not be regarded as partners. Standing alone, that determination would increase the tax liability of Mr. Rushlight with corresponding overassessment in the case of Mrs. Rushlight and Raymond, that was apparent on the face of the matter and there was no particular reason to examine those claims, they were what we know as protective claims.

The Court: I know Mr. Witness, that you are endeavoring to answer these questions correctly, but I call your attention to the fact that you haven't as yet answered the attorney's question.

A. I don't remember that we talked about that specific question until after agreement had been reached with respect to items of income, deductions and tax liabilities determined. [43]

* * * * *

Redirect Examination

Q. (By Mr. Bowden): Thank you very much on that point Mr. Williams. Now, I think you stated a moment ago that the claim for refund, or a claim for refund would generally find its way to the Director's office, or the audit division?

A. It would normally be filed with the Director, yes.

Q. At all times during these negotiations prior

(Testimony of A. N. Williams.)

to 1942 you did not have authority to dispose of a case administratively?

A. Prior to 1953 would be more exact.

Q. Prior to 1953 you alone did not have the authority?

A. It would be more correct to say that at the time I received delegation,—the point I am making is that I can't say whether it was before January 1, 1953 or after January 1, '53.

Q. In other words, you could not commit the Government on any settlement, and any settlement you proposed was [48] reviewable and would have to be accepted or rejected by, not only your superior but also legal counsel's superior, Mr. Pigg?

A. That's right.

Q. After 1952 the situation was such that you and legal counsel had to concur on a recommendation? A. That is correct.

Q. If you concurred you had authority to settle?

A. That's right.

Q. This latter authority I speak of was in existence at the time you settled the instant case?

A. The latter authority was in existence at that time, that is right.

Q. You and Mr. Pigg had authority to dispose of this case administratively?

A. Yes, subject, of course to the requirements of disposing of the petition through Tax Court channels.

Q. Yes, but in the last analysis you and Mr. Pigg had the authority? A. Yes.

(Testimony of A. N. Williams.)

Q. At any time during the consideration of these cases in your office,—may I rephrase that question. One of the principal contentions in this case, Mr. Williams, is that the petition filed in the Tax Court constituted a claim for refund, at any time during the considerations of these cases in your office did you or your office consider [49] the petition filed in the Tax Court as a claim for refund? A. No, we did not.

Q. Mr. Williams, does a review of your files indicate that prior to 1948, when the statutory notice of deficiency was sent, that taxpayer, through his counsel, had been advised to protect himself by filing protective claims for refund?

A. Yes, our files do so indicate.

Q. Do you recall approximately what year a letter to that effect was sent to counsel, was it in 1946?

A. The letter that I have in mind was mailed shortly before the statutory notice was issued?

Q. Sometime in 1947?

A. In 1948,—sometime shortly before the statutory notice was issued in May 1948.

Q. Does your file indicate that prior to the issuance of the statutory notice they had been put on notice by letter that they should protect themselves by filing a claim for refund?

A. Yes, and then as has already been testified the statutory notice itself carried further, a paragraph to that effect.

(Testimony of A. N. Williams.)

Q. A second notice was sent in the statutory notice of this deficiency? A. Yes. [50]

* * * * *

Recross Examination

Q. (By Mr. Burdick): Just a few questions. Mr. Williams, did you have before you during all these negotiations, in your files, the petition that was filed in the Tax Court by the Plaintiff in this case?

A. Sometimes those files accompany administrative files and at times they do not. In any event they are always available to me and in this case I think it was part of my file.

Q. So that you had before you during these negotiations, the petition that was filed by the Plaintiff in this case? A. That's right.

Q. That petition I think is exhibit numbered 2?

A. I have it, yes.

Q. I would like to call your attention to page 5 of the petition and ask you to read paragraph K of that? A. Yes.

Q. Now, did you ever tell the Petitioner's representative here that that wasn't a sufficient claim that the overassessment here was larger than was shown in the statutory notice?

A. I don't remember of that paragraph ever being discussed [52] I don't believe it was. In any event there is no claim in there of overpayment.

Q. But there is a claimed overassessment?

A. That's right.

Q. I call your attention to page 17 of the peti-

(Testimony of A. N. Williams.)

tion, paragraph "A" of the prayer, page 17 which I will read: "That there is an overassessment in Petitioner's excess profits tax for the taxable year ended December 31, 1943 of not less than $54,218.68 for said year." Now, did you ever tell the representative of the Petitioner that that wasn't a sufficient claim that there was an overassessment in excess profits tax of $54,218.68, for the year 1943?

A. That provision of the prayer was never discussed to my knowledge.

Q. But you did have this petition in your files?

A. Yes. [53]

* * * * *

[Endorsed]: Filed February 15, 1957.

[Endorsed]: No. 15419. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. A. G. Rushlight & Co., a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: January 23, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15419

UNITED STATES OF AMERICA, Appellant,

vs.

A. G. RUSHLIGHT & CO., an Oregon corporation, Appellee.

STATEMENT OF POINTS AND DESIGNATION OF RECORD

Appellant herein hereby files a statement of points on which it intends to rely, which are as follows:

1. The District Court erred in finding that the letter of May 28, 1948, advising the taxpayer of deficiencies in income tax for 1943 and 1944 and the overassessment of excess profits tax for 1943, was ambiguous and misleading as to what steps the taxpayer should take. This letter specifically states that the overassessment for 1943, which is here in issue, would be made the subject of a certificate of overassessment provided that the taxpayer fully protected himself against the running of the statute of limitations by filing a claim for refund on Form 843 with the Collector of Internal Revenue. A copy of this form was enclosed with the letter. Appellant alleges that the language in this letter was clear as to what steps the taxpayer should take in regard the overassessment for 1943.

2. The District Court erred in finding that the petition filed in the Tax Court gave the Commissioner of Internal Revenue sufficient notice of taxpayer's intentions and that the petition adequately set forth a claim for refund for 1943 excess profits taxes. A Tax Court petition cannot qualify as a claim for refund since it is filed with the Tax Court and not with the Commissioner of Internal Revenue, and since it was never identified as a refund claim. A claim for refund is only valid when it is identified as such. Otherwise, the Commissioner of Internal Revenue has nothing before him to accept or reject.

3. The District Court erred in finding that the Commissioner of Internal Revenue investigated the matters set forth in the Tax Court Petition as though it were a claim for refund and, therefore, the formal requirements of the statute and regulations were waived. There is no evidence in the record to show that the District Director's office took any action or verbally indicated to taxpayer that a portion of the petition filed in the Tax Court would suffice as a claim for refund. Merely carrying on negotiations with the District Director's office to redetermine income and excess profits tax deficiencies for both 1943 and 1944 as well as the excess profits tax overassessment for 1943 here involved, does not constitute a waiver of the claim for refund requirements.

Appellant herein hereby designates as the record material to this appeal, the following:

1. Complaint.

2. Answer.

3. Pre-trial Order.

4. Exhibits 1 through 7 attached to the pre-trial order.

5. The following portions of the reporter's transcript of April 27, 1956: Page 10, line 8-16; page 14, line 10 - page 25, line 24; page 33, line 3-23; page 40, line 24 - page 41, line 5; page 48, line 11-page 50, line 25.

6. Opinion of the District Judge.

7. Findings of Fact and Conclusions of Law.

8. Judgment.

9. Notice of Appeal dated October 29, 1956.

10. Notice of Appeal dated January 18, 1957.

11. Order Extending Time to File Record on Appeal, entered December 5, 1956.

12. Designation of Record.

13. This Statement of Points and designations as to contents of record on appeal.

CHARLES K. RICE,
Assistant Attorney General,
Counsel for Appellant

[Endorsed]: Filed February 2, 1957. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF RECORD

Comes now the Appellee and pursuant to Rule 17 of the rules of this court designates the following portion of the record on appeal as being material to this appeal.

1. The following portions of the reporter's transcript of April 26, 1956:

Page 6, line 25 - page 10, line 7; page 10, line 16 - page 14, line 9; page 26, line 16 - page 33, line 2; page 33, line 24 - page 40, line 18; page 41, line 6 - page 43, line 23; page 52, line 5 - page 53, line 16.

/s/ DENTON G. BURDICK, JR.
Of Attorneys for Appellee

Affidavit of Service attached.

[Endorsed]: Filed February 12, 1957. Paul P. O'Brien, Clerk.